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No. 931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Petitioner,

v.

STATE TAX COMMISSION OF MISSOURI, HUNTER PHILLIPS, Chairman, CARL E. DAVIS and J. RALPH HUTCHISON, Members, J. R. TOWSON, Secretary, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

JOHN C. STREET
615 C. A. Johnson Building
Denver, Colorado 80202

CLYDE J. LINDE
Floor Three
Union National Bank Bldg.
Kansas City, Missouri 64106

Attorneys for Petitioner

Of Counsel:

RICHARD T. CUBBAGE
COVINGTON & BURLING
LINDE, THOMSON, VANDYKE,
FAIRCHILD & LANGWORTHY

January 1969

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OPINIONS BELOW

The opinion of the Missouri State Tax Commission (R. 982-1047) is not officially reported and is reprinted in a separate appendix to this Petition.[1] (A16). The

[1] The record before the Circuit Court of Cole County, Missouri, consisting of 101 pages, is cited as "R-1" *et seq.* The remainder of the record, including the transcript of the hearing before the Missouri State Tax Commission, is cited as "R. 1" *et seq.*

Circuit Court of Cole County, Missouri, did not render an opinion. (R-86). The opinion of the Supreme Court of Missouri (R. 923) is not yet reported; it is reprinted in the separate appendix to this Petition. (A1).

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on September 9, 1968. (R. 922; A15). A timely filed motion for rehearing was denied on October 14, 1968. (R. 981). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, of the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

Section 151.060(3) of Vernon's Annotated Missouri Statutes (hereinafter "V.A.M.S."), Mo. L. 1945 p. 1825 § 7, provides in pertinent part:

> "In assessing, adjusting and equalizing any railroad property for any year or years the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to . . . ."

QUESTIONS PRESENTED

1. Whether a state deprives an interstate company of property without due process of law when the state's assessing agency, in determining the value of the company's property within the state for ad valorem property tax purposes, refuses to consider the evidence presented by the company concerning such value and instead relies upon arbitrary and irrational formulas that have the effect of imputing to the company's property within the state a greater value than it in fact has.

2. Whether, in assessing property for ad valorem property tax purposes, reliance by a state agency upon knowledge or information that was not part of the record in the proceedings before the agency denies a company whose property is being assessed the full and fair hearing guaranteed to it by the due process clause of the Fourteenth Amendment.

STATEMENT

On June 23, 1966, the Missouri State Tax Commission placed an assessment for 1966 of $33,429,871 upon the Missouri "distributable property" of the petitioner, the Chicago, Burlington & Quincy Railroad Company (hereinafter the "Burlington" or the "railroad").[2]

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[2] The Missouri State Tax Commission is the agency of Missouri with statutory responsibility for assessing most of the property of railroads and other public utilities. V.A.M.S. § 138.420. Some railroad property, principally real estate that is not used directly in railroad operations, is assessed locally by county officials and is not the so-called "distributable property" here at issue. V.A.M.S. § 151.100. "Distributable property" is so named because it is valued statewide and the values are then distributed among the counties of the state for ad valorem taxation.

(E-24). The Burlington asserted that the assessment was excessive by $12,707,871. (R-2). It requested a hearing, which was held early in 1967.[3]

At that hearing the Commission explained its assessment through the testimony of a staff official, its Supervisor of Taxes (R. 757-882):

(1) A value per mile was placed upon each type of track reported by the Burlington in Missouri. (R. 759). Thus, for example, the Burlington's main-line track in the state was assessed at $20,000 a mile. (R. 765-66, 820). Since the Tax Commission attempts to assess property at 30 percent of value (R. 831-35; A14, A69), the assessment of main-line track at $20,000 a mile indicates a valuation of such track at $66,666 a mile. The Burlington's second main-line, branch-line and side tracks were assessed at lesser figures per mile. (Ex. 15; R. 762). Added together the assessment for all Burlington track totalled $19,350,233. (*Ibid.;* A59). The Supervisor of Taxes testified that he had no record of how the mileage values were derived; he knew only that they were based upon past assessments. (R. 760). No testimony or other evidence was offered

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[3] Initially the Commission scheduled a hearing for the afternoon of July 7, 1966, and mailed the notice of hearing so that it reached the Burlington's office in Chicago on the morning of that day. (R-22). In an administrative review proceeding the Circuit Court of Cole County sustained the Burlington's contention that this action in substance denied it a hearing; the court ordered that another hearing be scheduled and that due notice be given the Burlington of the time and place of such hearing. (R-46).

to justify the particular mileage values employed by the Commission. (R. 760-62, 819).[4]

(2) The Burlington's Missouri right-of-way was assessed at $60 an acre. (R. 759). As with the track assessments, no evidence was offered by the Commission to justify this figure. (R. 762).

(3) Values were placed upon all the buildings and other fixed property on the right-of-way of the Burlington in Missouri. (R. 759). These values were then multiplied by 2.26566. (R. 763). The Supervisor of Taxes testified that he did not know how this multiplier was derived, stating only that it had been used for the past five years. (R. 826).

(4) A value was then placed upon all the rolling stock of the railroad by use of a multi-faceted formula (R. 759): First, all of the Burlington's rolling stock, wherever located, was valued by a cost-minus-depreciation method, whereby straight-line depreciation at 5 percent a year was allowed, with a floor of 25 percent of original cost placed upon depreciated value. This figure was then further reduced by being multiplied by 47 percent, the so-called "equalization" factor. (R. 771-74). The Supervisor of Taxes had no idea of the origin of this 47 percent equalization factor. (R. 828). He testified, however, that it was used to reduce the value of the rolling stock to 30 percent of its true value,

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[4] The Commission had originally assessed the main line at $22,625 a mile, but that figure was reduced to $20,000 a mile at the request of the Burlington's tax agent. No explanation was offered by the Commission at the hearing for either the $22,625 or the $20,000 figure. (R. 819-20).

since assessments of all property in Missouri are generally at 30 percent of market value. (R. 830-34). The depreciated, equalized value for all rolling stock was then multiplied by a percentage ascertained by determining the ratio between main-line mileage in Missouri and main-line mileage in the system as a whole—15.021 percent. (R. 773). Multiplying the depreciated, equalized value of the rolling stock of the Burlington by this percentage resulted in an assessment of the rolling stock of the Burlington in Missouri at $14,526,955. (R. 774).[5]

The figures for trackage, acres of right-of-way, buildings and fixed property and rolling stock, derived by application of the formulas just described, were then added together by the Commission, resulting in a sum of $34,817,172. (R. 774-76). The Commission, however, acknowledged that some account must be taken of the functional obsolescence of property. The Supervisor of Taxes explained how allowance was made for obsolescence in the case of the Burlington:

The ratio between the net operating income of the Burlington in 1965 and its total book-value investment in transportation property in that year was calculated. (R. 775). This ratio, 1.99 percent, indicated that on book-value investment Burlington received a return of only 1.99 percent. The Commission believed that an appropriate income yield on railroad operating property would be 10 percent. It then subtracted 1.99 percent from 10 percent to develop an "economic obsolescence" factor of 8.01 percent. (R. 776). The Commis-

[5] The Missouri mileage formula for valuing rolling stock is fully explained in Norfolk & Western Ry. v. Missouri State Tax Comm'n, 390 U.S. 317, 321 (1968).

sion then reduced the sum of the values that it had found for track, acreage, buildings and rolling stock by 8.01 percent to account for the operating property's obsolescence. (R. 776).[6]

The Burlington sought to offer the Commission an alternative to its mode of assessment based upon its arbitrary factors and irrational formulas. By the railroad's first witness, a consulting valuation engineer who had worked 38 years for the California Public Utilities Commission, the Burlington attempted to prove the actual cash value of the railroad as a whole and the portion of the railroad attributable to Missouri. (R. 50-52, 119-22). The qualifications of this witness were held insufficient, and his evidence was not received. (R. 123; A20-A23).

A second witness called by the Burlington was its General Tax Agent, who attempted to testify as to how the actual cash value of railroad systems should properly be measured and as to the value of the Burlington's distributable property in Missouri.[7] (R. 266, 304-17,

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[6] The irrationality of so deriving the obsolescence factor will be discussed below. (Pp. 16-17, *infra*). However, it should be observed that the Commission did not even apply its 8.01% factor correctly. The Commission calculated that 8.01% of the Burlington's assessed value equalled $2,913,281 (actually 8.01% of $34,817,172 equals $2,788,855). (R. 776). But it subtracted as the obsolescence figure based upon the 8.01% factor only $1,353,384. (R. 774-76). Like so many other features of the Commission's decision, the reason for subtracting this sum as opposed to the larger sum was unexplained. (R. 776).

[7] The Burlington also called a former employee of the Tax Commission. (R. 195). The Commission refused to receive this witness's testimony that property in Missouri is systematically assessed at 30% of actual value, ruling that he was not an expert and his qualifications to testify were not established. (R. 196-98). The fact that property is assessed at 30% has, however, been taken as a fact throughout this proceeding. (R. 830-35; A14).

318-22). An objection to this witness's principal exhibit, which was offered to show the grossly excessive character of the assessment reached by the Missouri Tax Commission's formulas, was sustained by the Commission. (R. 323). This exhibit demonstrated system-wide and Missouri values as follows (Ex. T; R. 323):

1966 Missouri Tax Value Based on Use of Three Factor Formula: (I) Capitalized Earnings, (II) Market Value of Stock & Debt and (III) Depreciated Investment in Road and Equipment.

		System	Missouri*
	(000)	(000)	(000)
I Net Railroad Operating Income as reported to I.C.C. (5-year average—1961-1965)	$ 22,553		
Capitalized at 7%		$322,186	$ 48,392
II Stock & Debt Value: (5-year average—1961-1965) Stock at Market Value ($152.61)	$260,718		
Mtge. & Equipment Trust Debt	$223,372		
Total	$484,090		
Less Value of Non-Opr. Prop.	$141,484	$342,602	$ 51,459
III Depreciated Investment in Transportation Property 12/31/65:		$714,821	$107,366
Total I, II and III			$207,217
IV Average Above 3 Factors			$ 69,072
V Full Value Equalized at 30%			$ 20,722

* Allocation to Missouri is on Road Miles Operated Basis—15.02%

It was also shown that three neighboring states used similar formulas albeit with variations both in the weight given to each of the three factors and in the

manner in which some of the factors were calculated. (Exs. U, V, W; R. 327, 329, 331).[8] If Missouri had used these formulas (of Colorado, Iowa and Nebraska) the Missouri assessment would have been $18,288,556, $21,106,894 and $17,672,315 respectively. (*Ibid.*)

These comparative assessment techniques were not offered to compel the Commission to use any one of them, but rather to demonstrate that (1) Missouri's formula method resulted in an excessive assessment and (2) there were alternative reasonable methods that had been tested by use in other states. (R. 326).[9]

In a variety of ways the Commission made clear that it was not at all interested in the rationalization of its assessment practices suggested by the Burlington. Its primary approach was to attack the credibility of the witnesses offering the Burlington's evidence. Thus, it concluded in its decision that the testimony of the Burlington's General Tax Agent and the valuation engineer from California "is not credible and is not worthy of belief." (A79). Along the same lines the Commission found that the exhibits that the Bur-

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[8] For example, Iowa, in using the three factors, values investment in property on the basis of its reproduction cost less allowable depreciation. Since reproduction cost typically exceeds original cost, Iowa then reduces investment in property by 40% before averaging it with the values derived from stock and debt and earnings calculations. (Ex. V; R. 329).

[9] Burlington's counsel told the Commission that the railroad did "not contend that you [members of the Commission] are required to use [the Burlington's method of assessment] . . . ." (R. 44). The railroad did insist, however, as it does here that the Commission must in some way modify its formulas, for example, by increasing the obsolescence factor or reducing the arbitrary track values, to take account of the Burlington's data. (R. 45).

lington urged should be considered in reaching an assessment were "not original records or verified transcripts of figures appearing on original records of the Railroad; that they are argumentative, inaccurate, and not worthy of belief and not considered by the Commission as evidence." (A26). The Commission also found that the methods of finding true value in other states were not persuasive as to the methods of finding true value in Missouri, since these other states had higher tax rates and thus could offset low assessments to yield the same amount of tax dollars as a higher valuation by Missouri. (A31-A32, A42-A44).

Although it rejected the Burlington's evidence on grounds of credibility and reliability, the Commission at the same time purported to use some of the railroad's suggested techniques and statistics to justify the Commission's assessment. (Ex. 21; R. 795). In doing so, it chose a figure for stock and debt value of the railroad system that included nearly $150,000,000 of nonoperating property, even though Missouri's share of that property is not assessed by the State Tax Commission but is assessed locally. V.A.M.S. § 151.100. In addition, the Commission nearly doubled the book-value investment of Burlington property in Missouri by taking the Iowa replacement-cost approach to investment but, unlike Iowa, not reducing that value by 40 percent. See p. 9 n. 8, *supra*.

Finally, the Commission relied upon the testimony of its Supervisor of Taxes that the methods suggested by the Burlington for assessment could not be used since only 3 percent of the Burlington's stock is publicly held (the other 97 percent being held by the Great Northern Railroad and the Northern Pacific Railroad in equal parts). (A67-A68). The Commission's witness had observed that in 1965 just over 2,000 shares of

Burlington stock were traded and stated that this did not constitute a sufficiently large market for the stock to allow for valuation of the railroad by the stock and debt method. (R. 809-10). The Commission also cited the Supervisor's testimony that because the Burlington was controlled by two other railroads its annual earnings were not an accurate reflection of its true worth. (A 68).[10]

After holding its hearings the Commission made a final assessment on May 24, 1967, in the amount of $35,207,695, a $1,777,824 increase over its prior challenged assessment. (R. 776; A81). This higher sum resulted from the acceptance by the Commission of its formula approach to valuation of the railroad and the addition of $1,777,824 representing the assessed value of property that had been omitted in the earlier assessment. (Ex. 37A; R. 867).

The Burlington filed a petition for review of the Commission's action in the Circuit Court for Cole County. (R-51). It alleged, among other things, that the assessment violated the due process clause of the Fourteenth Amendment, in that the assessment was "arbitrary" and was based upon procedures that denied the railroad a "fair hearing." (R-65). That court affirmed the Commission's final decision in a judgment entered without opinion on September 28, 1967. (R-86).

Thereupon the Burlington appealed to the Missouri Supreme Court where it again urged that the Commission's assessment of its property was arbitrary and irrational and that the evidence it sought to introduce

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[10] In making this latter finding the Commission did not explain why railroad operating income could be used by the Commission to calculate the Commission's obsolescence factor, p. 6, *supra*, but not by the Burlington to compute the value of the railroad.

was wrongfully excluded and disregared by the Commission in violation of the due process clause of the Fourteenth Amendment (R-99).

The Missouri Supreme Court's response to the Burlington's constitutional challenge to the assessment was basically twofold. First, it observed that under a Missouri statute, V.A.M.S. § 151.060, and Missouri case law "the Commission could disbelieve plaintiff's evidence of value, even without other evidence" so long as it did not "act upon whim and without reason." (A 9). Holding that "the record and the Commission's findings do not demonstrate a studied rejection of or hostility to one side of the case before the Commission," the court allowed the Commission to reject completely the evidence offered by the Burlington as lacking credibility. (A8). In the same vein, the court also found that the Commission was not bound to any single formula, rule or method in making an assessment and that its assessment, even if reflective of overvaluation, would not be set aside unless shown by the taxpayer to be the product of "an intentional plan or design of discrimination" or "so grossly excessive 'as to be entirely inconsistent with an honest exercise of judgment.'" (A12).

REASONS FOR GRANTING THE WRIT

I

In holding that the Missouri Tax Commission could assess the Burlington on the basis of irrational and arbitrary formulas and in disregard of the rational assessment methods suggested in the Burlington's evidence, the Missouri Supreme Court has decided a substantial federal question in a way that does not accord with the applicable decisions of this Court.

Indeed, a decision of this Court rendered just last spring and involving another railroad assessment by the Missouri Commission establishes unequivocally the basic constitutional infirmity in the decision below. *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n,* 390 U.S. 317 (1968).[11] At issue in that case was only one facet of the Missouri Tax Commission's procedures with respect to railroads—the mileage formula for valuing rolling stock within the state—but the guiding principle stated by the Court is fully applicable here:

> "Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State." 390 U.S. at 325.

Applying this principle, the Court held that, while a mileage formula for allocating rolling stock values was rational on its face, resting as it did upon the assumption that the rolling stock of a railroad was evenly distributed throughout a railway system, in the *Norfolk & Western* case the taxpayer had shown that the application of the mileage formula to it resulted in such gross overreaching beyond the values represented by assets within Missouri as to violate the due process

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[11] The Missouri State Tax Commission rendered its decision here prior to this Court's decision in *Norfolk & Western.* Accordingly, it is not surprising that the Commission failed to follow the rule laid down by this Court in that case. The opinion of the Supreme Court of Missouri was announced after *Norfolk & Western.* The court did not, however, cite that case, partly perhaps as a result of the fact that the main brief for the Burlington was filed prior to this Court's action in that case. The railroad did cite the *Norfolk & Western* case to the Missouri Supreme Court in its petition for a rehearing en banc, but that petition was denied without opinion. (R. 981).

and the commerce clauses. The Court summarized its holding as follows:

> "We repeat that it is not necessary that a State demonstrate that its use of the mileage formula has resulted in an exact measure of value. But when a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in its particular case, the State is obliged to counter that evidence or to make the accommodations necessary to assure that its taxing power is confined to its constitutional limits. If it fails to do so and if the record shows that the taxpayer has sustained the burden of proof to show that the tax is so excessive as to burden interstate commerce, the taxpayer must prevail." 390 U.S. at 329.[12]

Compare *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, — U.S. —, slip opinion p. 5 (Nos. 13 and 15, decided Nov. 12, 1968).

The *Norfolk & Western* case, dealing with a formula that on its face was rational, is an a fortiori precedent in the present case. For the formulas relied upon by the Tax Commission in the instant case are irrational.

As explained above, the Tax Commission assessed each mile of track of the Burlington at a given fig-

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[12] While in this summary of its holding the Court alluded only to the commerce clause, in the final paragraph of its decision it stated quite clearly that "on the present record, Missouri has in this case exceeded the limits of its constitutional power to tax, as defined by the Due Process and Commerce clauses." 390 U.S. at 329-30. Accordingly, the *Norfolk & Western* case is fully applicable in the present litigation, despite the fact that the Burlington did not make commerce clause arguments as such in the lower courts, but instead relied upon the due process clause. See also National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 (1967).

ure. Main track was valued at $66,666 and assessed at $20,000 a mile. But the witness for the Commission testified that he was unable to explain how this figure was derived and could state only that it had been used in the past.[13] The same was true of the $60 an acre assessment placed upon land used by the railroad as right-of-way. Equally arbitrary was the 2.26566 factor used in the formula to arrive at the assessed value of the Burlington's buildings and other fixed property.

The formulas for determining the value of trackage, right-of-way and fixed property are properly characterized as irrational because they are based upon factors that are unexplained and bear no reasonable relationship to the valuation of the railroad's property. Other parts of the formulas used by the Tax Commission are irrational not merely because the factors are arbitrary, but also because on their face they do not achieve what they purport to achieve.

For example, the depreciated value of rolling stock is multiplied by a 47 percent factor to equalize the assessed value of rolling stock with the value of other property located in the state. A quotation from the opinion below reveals the irrationality of this factor:

> "Mr. Norfleet stated that employment of the 47% equalization factor reduced the value of rolling stock to the level of 30% of value which the

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[13] It is true that the Commission cited evidence that the Burlington had recently constructed a short segment of main-line track at a cost in excess of $66,666 a mile. (R. 474-75; A33). But such evidence cannot justify a valuation of all the Burlington track at that figure; much of the Burlington main-line was acquired and constructed over 100 years ago and would not be reproduced today at current costs. (R. 278; Ex. N; R. 280).

> Commission tries to achieve in assessments. He stated also that the formula used for the entire assessment brought C.B. & Q., and railroad property generally, to the desired 30% level of value." (A5).

The 47 percent factor used in assessing rolling stock is plainly irrational. If 47 percent of some value equals 30 percent of some other value, it is only by the sheerest accident.[14]

The irrationality of the 8.01 percent obsolescence factor (pp. 6-7, *supra*) is also easily demonstrated. Assuming, as the Commission did, that it must discount the book value of property to reflect its value in use, see *Great Northern Ry.* v. *Weeks,* 297 U.S. 135, 151 (1936); *Southern Ry.* v. *Kentucky,* 274 U.S. 76, 81-82 (1927), the use of the 8.01 percent factor was altogether arbitrary and unreasonable—even if the mathematics of its use had been correct (p. 7 n. 6, *supra*). As explained above, this figure was arrived at by determining that the railroad's net operating income showed a return of only 1.99 percent on the book value of its assets, whereas the Commission thought that 10 percent was an appropriate return. It then obtained the 8.01 percent figure by subtracting 1.99 percent from 10 percent.

But the comparison between the actual return on the book value of the railroad's property and some postulated desirable yield cannot be made by merely subtracting the former percentage figure from the latter.

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[14] In the *Norfolk & Western* case the railroad did not challenge the 47% equalization factor. See 390 U.S. at 321. Accordingly, nothing in the *Norfolk & Western* opinion in any way supports the notion that the use of a 47% factor in handling rolling stock was reasonable.

Instead, the comparison to be rational must be determined by dividing the larger figure into the smaller one. Thus, if a railroad should realize 10 percent on its property but is instead obtaining only 2 percent, its investment is only 20 percent effective (2 percent being 20 percent of 10 percent) and to account for obsolescence the book value of the property should therefore be reduced by a factor of 80 percent, not 8 percent. Thus, the 8.01 percent factor used by the Commission in determining obsolescence was completely irrational.

The Burlington could perhaps have rested below on the ground that the assessment was generated by a formula irrational on its face and was therefore invalid. *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n, supra* at 325. Compare *Louisville & N.R.R.* v. *Greene,* 244 U.S. 522, 554 (1917). However, the Burlington did not choose to do that. Instead, it offered copious evidence concerning the real value of the railroad and the appropriate share of that value that Missouri could tax. It proved that Missouri's portion of the railroad's worth taken as an average of its value in terms of stock and debt, capitalization of net income and book value of assets resulted in a valuation of only approximately $20,000,000, about $15,000,000 below the assessment reached by the Missouri Tax Commission's arbitrary procedures. The Burlington therefore placed itself within the rule of the *Norfolk & Western* case by coming forward with "strong evidence tending to prove that the . . . formula will yield a grossly distorted result . . . ." 390 U.S. at 329.

The Tax Commission, rather than following the mandate of this Court in *Norfolk & Western, i.e.,* counter-

ing the railroad's evidence or making accommodations necessary to insure that its taxing power was confined to its constitutional limits, simply refused to credit the Burlington's evidence.

Rejecting the testimony of the Burlington's expert witnesses as incredible and applying the best evidence doctrine in a peculiarly rigorous manner (pp. 9-10, *supra*) were transparent devices to avoid dealing with the Burlington's evidence on its merits. One need only contrast this approach to the railroad's evidence with the Tax Commission's tolerance of the evidence of its own witness; the Commission accepted every detail with respect to the manner in which the witness justified the assessment.

The attempt to depreciate the validity of the assessment method suggested by the Burlington on the ground that the Burlington is controlled by two other railroads was merely another contrived device to allow the Commission to ignore real evidence of value and rely upon its irrational formulas. The statement that the Burlington's earnings were affected by the fact that it is controlled by two other railroads was merely an assertion on the part of the Commission totally lacking substantiation. The two railroads that control the Burlington—the Great Northern and the Northern Pacific—are not its competitors, see *United States* v. *ICC*, — F. Supp. —, slip opinion p. 10 (D.D.C. Civ. Action No. 1132-68, decided Nov. 20, 1968), and therefore they have no reason to cause it to lose money. Indeed, they are in a position, because of geography, to channel traffic to the Burlington in preference to other lines. *Id.* at 9-10.

The Commission also stated that only the 3 percent of the Burlington stock that was not owned by the two controlling railroads was traded. It then relied upon testimony that stock prices were not an accurate indicator of the value of the railroad because "the purchase of stock '*should* enable the buyer' to contemplate he might assert some voice in the direction and control of the company involved." (emphasis in original). (A 68). But that observation certainly does not apply only to the Burlington. Railroads typically are such large business entities that rarely, if ever, can an individual shareholder rationally believe that the shares he holds will allow him to exercise control over corporate affairs.[15]

The objections advanced to the stock and debt and the capitalization of income methods failed to recognize that the Burlington did not insist that those methods alone must be used to measure the value of the railroad. Instead, it urged only that those methods be considered and be given some weight by the Commission in adjusting the assessment reached by arbitrary formulas. Moreover, the objections to the propriety of the use of these methods of valuation put forward by the Commission are squarely refuted by the fact that other state tax commissions employ these

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[15] It has long been accepted that valuing railroads on the basis of capitalization of income or the stock and debt method is the most accurate technique for obtaining assessments for ad valorem taxation purposes. See Martin, *Valuation of Railroads for Ad Valorem Taxation*, 33 Taxes 619 (1955).

methods in valuing the Burlington.[16] See *Chicago, B. & Q. R.R.* v. *Department of Revenue,* 17 Ill. 2d 376, 161 N.E.2d 838 (1959).

The Burlington has quite clearly borne the burden imposed upon it by the *Norfolk & Western* case and has shown that the irrational formulas used by the Missouri State Tax Commission generate an assessment far above the real value of the property employed by the railroad in the state.

II

In another important respect the decision below is inconsistent with guarantees of the Fourteenth Amendment. The Missouri Supreme Court met the Burling-

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[16] Other means employed below to sustain the Tax Commission's obliteration of the Burlington's evidence similarly will not bear scrutiny.

The errors involved in the Commission's attempt to utilize the railroad's suggested assessment techniques have been discussed, p. 10, *supra,* and do not need repeating.

The Missouri Supreme Court observed that the Burlington pays no greater share of its tax dollars to Missouri than it pays to other states. (A13-A14). That is beside the point. At issue here is the question of assessment, not the appropriate tax rate for property within Missouri. If Missouri's methods of assessment were sustained by this Court, there would certainly be no constitutional impediment to raising Missouri tax rates to generate more tax dollars than its neighboring states.

The court also compared the assessment entered against the Burlington with assessments entered against other railroads in Missouri. (A13). Such a comparison has no meaning without a further discussion of the nature of the operations of those railroads in Missouri as contrasted with the Burlington's. The Missouri Supreme Court did not engage in such a discussion. Moreover, it would be no defense to a charge of gross overreaching on the part of the Tax Commission in violation of the due process clause to recite that other railroads were subjected to the same overreaching.

ton's argument that the assessment was unsupported by competent evidence by relying upon Missouri statutory and case law to hold that Commission assessments can be overturned only if they "demonstrate a studied rejection of or hostility to one side of the case." The court went on to rule that no such hostility had been proved by the Burlington and therefore under Missouri law the Commission could totally disregard the Burlington's evidence even in the absence of evidence of its own. But an assessment, to be valid under the due process clause, must be based upon evidence.

It cannot be said that the Commission's witnesses produced evidence of the value of the railroad's Missouri property. As was demonstrated above, the principal witness for the Tax Commission merely recited the formulas used by the Commission and had no idea how most of the formula figures were derived. Such recitation was mere assertion, not evidence of value.

These is no doubt that the Burlington had a right under the due process clause to a hearing before the Tax Commission. *Londoner* v. *Denver,* 210 U.S. 373 (1908); *Turner* v. *Wade,* 254 U.S. 64 (1920); *Ricardo* v. *Ambrose,* 211 F.2d 212, 221 (3d Cir. 1954). Cf. *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n,* 390 U.S. 317, 326-29 (1968).

"[T]he right to a hearing means the right to a meaningful hearing." *Gonzales* v. *United States,* 348 U.S. 407, 415 (1955). To have a meaningful hearing a taxpayer must know what evidence is being used against him and must have a reasonable opportunity to meet that evidence. *Morgan* v. *United States,* 304 U.S. 1, 18 (1938); *Carter* v. *Kubler,* 320 U.S. 243, 247 (1943). Therefore, when the Commission made an ex-

cessive assessment of the Burlington's property on the basis of matters that were neither placed in evidence before it nor properly made the subject of official notice it deprived the Burlington of property without due process of law. See *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 530 (1946); *United States* v. *Abilene & So. Ry.,* 265 U.S. 274, 286-90 (1924); *Hornsby* v. *Allen,* 326 F.2d 605, 608, *rehearing denied,* 330 F.2d 55 (5th Cir. 1964).

That deprivation and the manner of its effectuation were particularly egregious because the property interests of the railroad that are at stake enjoy a high degree of substantive as well as procedural constitutional protection. *Fargo* v. *Hart,* 193 U.S. 490 (1904); *Union Tank Line Co.* v. *Wright,* 249 U.S. 275 (1919); *Wallace* v. *Hines,* 253 U.S. 66 (1920); *Southern Ry.* v. *Kentucky,* 274 U.S. 76 (1927); *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n, supra.* A procedural right is often recognized "not as an end in itself, but as a means of defending substantive interests." *Fay* v. *Douds,* 172 F.2d 720, 725 (2d Cir. 1949). If the substantive interests that are involved in tax assessments are to be effectively protected, it is necessary for the assessing authority to reveal the evidence, if any, upon which it bases its decision. If it fails to do this, as the Missouri Tax Commission has failed here, courts are deprived of the opportunity to exercise a meaningful judgment as to whether the assessing authority has exceeded the limits placed upon it by the due process and commerce clauses. "[F]or administrative decisions based on substantial evidence and reasoned findings . . . alone make effective judicial review possible . . . ." *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R., supra, slip. op.* p. 5.

CONCLUSION

The decision below is squarely in conflict with the recent pronouncement of this Court in *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n,* 390 U.S. 317 (1968). The decision is also inconsistent with the right of the Burlington to have the hearing before the State Tax Commission guaranteed to it by the Fourteenth Amendment. The petition should be granted.

Respectfully submitted,

WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

JOHN C. STREET
615 C. A. Johnson Building
Denver, Colorado 80202

CLYDE J. LINDE
Floor Three
Union National Bank Bldg.
Kansas City, Missouri 64106

Attorneys for Petitioner

Of Counsel:

RICHARD T. CUBBAGE
COVINGTON & BURLING
LINDE, THOMSON, VANDYKE,
FAIRCHILD & LANGWORTHY

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No. 931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Petitioner,

v.

STATE TAX COMMISSION OF MISSOURI, HUNTER PHILLIPS, Chairman, CARL E. DAVIS and J. RALPH HUTCHISON, Members, J. R. TOWSON, Secretary, *Respondents.*

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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APPENDIX

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

No. 53,500

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, *Appellant*,

v.

STATE TAX COMMISSION OF MISSOURI, HUNTER PHILLIPS, Chairman, CARL E. DAVIS and J. RALPH HUTCHISON, Members, J. R. TOWSON, Secretary of the State Tax Commission, *Respondents*.

Appeal from the Circuit Court of Cole County
The Honorable James T. Riley, Judge

Proceeding under Section 536.100, et seq., V.A.M.S., for judicial review of a final decision of the State Tax Commission of Missouri. The circuit court affirmed the decision, and the railroad's appeal involves construction of the revenue laws of the state.

On June 23, 1966, the State Tax Commission of Missouri assessed the distributable property in Missouri of the Chicago, Burlington & Quincy Railroad Company for 1966 at $33,429,871. C. B. & Q. sought a review of that decision alleging, among other things, that the Commission had denied the railroad a hearing at which to present its theory of assessment. The circuit court remanded the case to the Commission with directions that C. B. & Q. be granted a hearing.

C. B. & Q. filed Commission Form No. 1, "Statement of Taxable Property owned by the C. B. & Q. Railroad Company on the first day of January, 1966, required to be made to the State Tax Commission, as provided in Section 151.020, R.S. Mo., 1959." Section 151.020, V.A.M.S.,

requires the statement to be made under oath and to contain "in detail the total length of * * * road * * * including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks, in each county (and other specified tax districts) * * *; the total number of engines and cars of every kind and description * * * and all other moveable property owned, used or leased * * *, and the actual cash value thereof."

At the hearing C. B. & Q. presented its theory of assessment of the property returned on Form No. 1 through witnesses Broley E. Travis, a consulting valuation engineer and former valuation engineer in the Valuation Department of the Public Utilities Commission of the State of California, and James P. Reedy, general tax agent for C. B. & Q. Their testimony and the railroad's theory are summarized in this reproduction of C. B. & Q. Exhibit T:

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

1966 Missouri Tax Value Based on Use of Three Factor Formula: (I) Capitalized Earnings, (II) Market Value of Stock & Debt and (III) Depreciated Investment in Road and Equipment

			System	Missouri*
		(000)	(000)	(000)
I	Net Railway Operating Income: as reported to I.C.C. (5-year average—1961-1965)	$ 22,553		
	Capitalized at 7%		$322,186	$ 48,392
II	Stock & Debt Value: (5-year average—1961-1965)			
	Stock at Market Value ($152.61)	$260,718		
	Mtge. & Equipment Trust Debt	223,372		
	Total	$484,090		
	Less Value of Non-Opr. Prop.	141,484	$342,606	$ 51,459
III	Depreciated Investment in Transportation Property 12/31/65:		$714,821	$107,366
	Total I, II and III			$207,217
IV	Average Above 3 Factors			$ 69,072
V	Full Value Equalized at 30%			$ 20,722

* Allocation to Missouri is on Road Miles Operated Basis—15.02%.

Mr. Travis and Mr. Reedy were of the opinion that the theory presented by Exhibit T was the best method of valuing a railroad for tax purposes, and Mr. Reedy stated the request for a hearing before the Commission was to show the Commission indicators of value other than those employed by the Commission; however, Mr. John Street, of counsel for C. B. & Q. at the hearing, stated that the railroad did "not contend that you (members of the Commission) are required to use it."

C. B. & Q. also presented J. Edward Connell, former supervisor of ad valorem taxes with the State Tax Commission of Missouri to establish the equalization factor of 30 percent.

The Commission's assessment of the property returned on Form No. 1 rejected the method suggested by C. B. & Q. and the method used was explained through the testimony of Carl A. Norfleet, supervisor of taxes for the Commission. He made the Commission's computations and stated that in assessing railroads and utilities market value is rarely known because there were rarely any sales of railroads between a willing buyer and a willing seller. Therefore, any assessment is an estimate under any method and no valuation will be scientifically exact. The Commission employs a method to meet requirements that an assessment be reasonable and nondiscriminatory.

As with all railroads operating in Missouri, he (and the Commission) used a method under which a value per mile was placed upon each type of C. B. & Q. track reported by C. B. & Q. in Missouri; a value per acre was placed upon the number of acres of C. B. & Q. right of way reported to be in Missouri; a value was placed upon the C. B. & Q. buildings and other fixed property reported by C. B. & Q. in Missouri; a value was placed upon the rolling stock of C. B. & Q., Missouri's portion being ascertained by calculating the ratio (15.02%) between the number of miles of first main-line and branch-line track used by C. B. & Q.

in Missouri and these items in the entire system. The aggregate value thus determined was reduced by an economic obsolescence factor. The acreage value, $60 per acre, was the same as employed in 1964 and 1965 assessments. The railroad's report of buildings and other fixed property was returned by C. B. & Q. at $384,859. This was adjusted to $399,913 and "trended upward" by the Commission by a factor of 226.566, resulting in a value of $906,067. The factor is used to bring reported values up to current reproduction cost and to offset low values reported in Form No. 1.[1]

Main line value was first set at $22,625 per mile but reduced to $20,000 per mile at the request of Mr. Reedy. Valuation of other types of track was made using values per mile employed in previous years.

Rolling stock reported by C. B. & Q., according to units, type, age, and original costs, was depreciated 5% per year until a base of 25% of original cost was reached, not to be reduced further so long as the unit remains in service. The depreciated cost was then equalized by a factor of 47%, i.e., 47% of 25% of original cost after 15 years, an ultimate valuation of 11.75% of original cost of such units.

The depreciated original cost of C. B. & Q. rolling stock, including leased rolling stock, was found at $205,649,935, and equalized at 47%, resulting in an equalized value of $96,665,469 for taxation on rolling stock. Application of the 15.021% ratio factor resulted in Missouri's allocated portion of rolling stock at $14,518,618 to which was added $8,337 for leased cars, an ultimate value of $14,526,955. Addition of $19,350,233, value of roadbed, fixed property,

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[1] E.G., in testifying relative a particular depot building Witness Reedy of C. B. & Q. stated: "Where the building freight depot was built in 1961 at an original cost of $666,397, the depreciated cost was $664,021. I returned $95,000 as the value of that freight depot knowing that there would be a $223,000 assessment placed upon it utilizing the historical 226 point multiplier."

$906,067, rolling stock, $14,526,955, less economic obsolescence, $1,353,384, resulted in an aggregate assessment of all distributable property of C. B. & Q. for 1966 of $33,429,875.

The economic obsolescence factor was calculated from a consideration of the railroad's total investment in transportation property compared to net railway operating income for 1965, as reported by C. B. & Q. on Form No. 1 in 1966. This calculation found net operating income at $20,423,802, subtracted the resulting percentage, 1.99%, from a desired income yield of 10%, which developed a factor of 8.01% for economic obsolescence. Mr. Norfleet stated that employment of the 47% equalization factor reduced the value of rolling stock to the level of 30% of value which the Commission tries to achieve in assessments. He stated also that the formula used for the entire assessment brought C. B. & Q., and railroad property generally, to the desired 30% level of value. Also in the opinion of Mr. Norfleet the assessment theory of C. B. & Q., based on stock and debt, should be rejected because C. B. & Q. is closely held by two other railroads and because only some 2,000 of 1,708,391 shares of stock had been traded in the previous year and these were not open market transactions.

In addition to the $33,429,871 total assessment first calculated by the Commission from Form No. 1 as filed by C. B. & Q., the Commission developed unreported properties and additional values at the hearing. Through testimony of L. Glenn Key, general land agent for C. B. & Q., the Commission adduced evidence that C. B. & Q. had, in recent years, sold certain tracts of locally assessed real estate which it owned adjacent to its right of way in North Kansas City and in St. Louis, Missouri; that these tracts had sold for an average price in excess of $10,000 per acre and that, through use of these sales as comparisons, 224.47 acres of right of way, located on similar land in the

C. B. & Q. yards in North Kansas City and 107.67 acres in the St. Louis yards should be valued at an additional $3,080 per acre based on a 30% level assessment, an addition of $677,899. Unreported distributable property used in the railroad's "piggyback" operation was assessed at an additional $731,791. Similarly twelve unreported diesel locomotives were assessed at $197,774. After application of the economic obsolescence factor, a total additional valuation of $1,777,824 was added to the previous assessment of $33,429,871. This resulted in the final assessment for 1966 of $35,207,695 affirmed by the circuit court on review.

Appellant contends: Points I and II, that it was not given a fair, unbiased and impartial hearing, and was denied due process by exclusion of testimony and exhibits; Points III, IV, and VII, that the assessment did not follow legal principles and was made without authority, contrary to Chapter 151, RSMo., is not supported by competent evidence, and results from arbitrary, capricious and unreasonable conduct on the part of the Commission; Points V and VI, that the assessment is invalid because the Commission failed to receive and consider evidence relating to appellant's method of valuation of railroad property and concerning actual cash value of its property; and, Point VIII, that the assessment discriminates against appellant.

Pursuant to Article 10, Section 5, Constitution of Missouri, Chapter 151, V.A.M.S., provides for ad valorem taxation of railroad companies.

Section 151.010 provides that all railroads and all real property, tangible and intangible personal property, owned, hired, or leased in Missouri, shall be subject to taxation, "and taxes levied on real property, and tangible personal property, shall be levied in the manner herein set forth, and the taxes on intangible property shall be levied and collected in the manner otherwise provided by law."

The provisions of Section 151.020 concerning the railroad's report of its distributable property to the State Tax Commission already have been stated.

Section 151.060 provides that the Commission "shall assess, adjust and equalize the aggregate valuation of the property" of each railroad in the state; shall have power to summon witnesses; and "shall have the power, upon their knowledge, or such information as they can obtain, to increase or reduce the aggregate valuation of the property of any railroad company included in the statements and returns made by the railroad companies * * *, and shall assess, adjust and equalize any other tangible property belonging to said railroad companies, * * * upon which no returns have been made, which may be otherwise known to them, as they deem just and right." The Commission "may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

Section 151.090 provides that the Commission shall certify its action (assessment) to the railroad company. "The certificate shall set forth the entire length of the railroad, including sidetracks, in the state, and the valuation thereof per mile; the total value of the rolling stock of the railroad; the total length of the roadbed, including sidetracks, in each county (and other specified tax dis-

tricts) * * *; also the total value of roadbed and sidetracks and rolling stock as assessed, adjusted, equalized, and apportioned to such county, etc. * * *."

Section 151.100 provides that real property, or tangible personal property, including lands, buildings, goods, chattels and office furniture of the railroad shall be assessed by the proper assessor.

In respect to appellant's Points I and II, there is no question that the Commission as an administrative agency owed C. B. & Q. a fair hearing, *National Labor Relations Board* v. *A. Sartorious & Co.*, 2 Cir., 140 F. 2d 203, 205[2], *Local No. 3, etc.* v. *N.L.R.B.*, 8 Cir., 210 F. 2d 325, 329-330, *Jones* v. *State Dept. of Public Health and Welfare,* Mo. App., 354 S.W. 2d 37, 39-40[2-6], 41[10], and due process, *Donnelly Garment Co.* v. *National Labor Relations Board,* 8 Cir., 123 F. 2d 215, 224[12-14], *The Chicago Junction Case,* 264 U.S. 258, 265, *Morgan* v. *United States,* 298 U.S. 468, 480. However, the statements which those cases provoked are not applicable here because the record and the Commission's findings do not demonstrate a studied rejection of or hostility to one side of the case before the Commission. It is true that the Commission gave greater and prevailing weight to the evidence of its own witnesses, but this is in accord with statutory authority. It is true also that the record and findings show that some of the testimony and exhibits offered by C. B. & Q. were received over Commission objection "for what it (or they) might be worth," but this, too, is consistent with the authority given the Commission. The Commission's findings demonstate a detailed recital and examination of the testimony of the railroad's witnesses and exhibits, and upon such examination that evidence was found to lack the credibility attached to the Commission's own presentation in arriving at the assessment. Appellant's charges of refusal to consider its case and protestations of unfair treatment are refuted by this record of nearly 900 pages and the Com-

mission's findings of fact of nearly 62 pages which provide graphic attestation to ample opportunity for C. B. & Q. to present its theory to the Commission and full consideration of that theory by the Commission. The hearing procedure was thus in accord with the provisions of Section 151.060, supra, and appellant's citations. "The Commission could disbelieve plaintiff's evidence of value, even without other evidence * * *, although it may not * * * act upon whim and without reason," *May Department Stores Co.* v. *State Tax Commission,* Mo., 308 S.W. 2d 748, 761[16]; and the Commission's findings make plain why it did not consider the railroad's witnesses and exhibits credible in the circumstances presented by this case. *Cupples-Hesse Corp.* v. *State Tax Commission,* Mo., 329 S.W. 2d 696, 701[12]; *State ex rel. Kahler* v. *State Tax Commission,* Mo., 393 S.W. 2d 460, 465[7].

Appellant's contention under Points III, IV, and VII, is that the Commission's assessment method does not follow Section 151.060, supra, to achieve "aggregate valuation," because it values separate parts of the railroad; that it does not comport with Section 151.020, supra, requiring a railroad to report its distributable property at "actual cash value," and therefore fails to meet the requirement of construing taxing statutes in favor of the taxpayer. See *Green Fire Brick Co.* v. *State Tax Commission,* Mo., 277 S.W. 2d 544, 545; *United Air Lines, Inc.* v. *State Tax Commission,* Mo., 377 S.W. 2d 444, 448; *Union Electric Co.* v. *Morris,* Mo., 222 S.W. 2d 767, 770; *State ex rel. Halferty* v. *K. C. Power & Light Co.,* Mo., 145 S.W. 2d 116, 121; *State ex rel. Moore* v. *Wabash R. Co.,* Mo., 208 S.W. 2d 223, 226. The argument is that the Commission failed to heed these citations in rejecting the railroad's theory of assessment and employed a theory of assessment not supported by the evidence.

It has already been demonstrated that the railroad's theory of assessment was received, fairly considered, and

rejected upon credibility findings, leaving for determination whether the Commission's method followed the statute, was reasonable, and supported by evidence.

The theory of the Commission and the evidence in support of that theory have already been stated in detail in a review of the testimony of Mr. Norfleet. Again, despite protestation to the contrary, the steps followed in the method employed by the Commission show that the Commission did arrive at an aggregate valuation of the railroad's property as a unit in that valuation of the aggregate necessarily cannot be broken into divisible parts as by county lines, but is necessarily a valuation of the total of the railroad's component parts,[2] i.e., a unit composed of "tracks, depots, water tanks, turntables, rolling stock, etc., known in common parlance and denominated in this statute (now Section 151.060) as a railroad." *State ex rel. Murphy* v. *Stone*, Mo., 25 S.W. 211, 213; *State Railroad Tax Cases*, 92 U.S. 575, 606; *Hannibal & St. Joseph R. Co.* v. *State Board of Equalization*, 64 Mo. 294, 306; *Elliott on Railroads*, 3d Ed., Vol. 2, Sec. 883; and in respect to rolling stock in particular, see *St. Louis Southwestern Ry. Co.* v. *State Tax Commission*, Mo., 319 S.W. 2d 559, 561[1]. In assessments there is no such thing as an absolute "true value," "true cash value," or "actual cash value," because an assessment is at best an estimate and it is presumed correct unless proved by the taxpayer to be arbitrary or discriminatory. *Cupples-Hesse Corp.* v. *State Tax Commission, supra*, 329 S.W. 2d l.c. 700[3]. Actual cash value "is the amount of cash that goods will bring on the market," *Bouvier Law Dictionary*, p. 1209, and rarely, if ever, is a railroad assessed under circumstances where such a cash price can be shown. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 370.

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[2] In order to certify its action to the railroad in compliance with Section 151.090, supra, the Commission necessarily must determine the value per mile of tracks, the value of rolling stock, and the value of roadbed, etc., of the railroad.

In addition to the contentions in Points I and II relating to fair hearing and due process, appellant contends, Points V and VI, that the assessment is invalid because of refusal to consider evidence on the railroad's theory of valuation and actual cash value.

It already has been shown that the Commission did receive and consider such evidence. Yet this contention, despite the record and, more particularly, in the face of the previously quoted representation of Mr. Street as counsel for C. B. & Q., suggests that the railroad's theory of assessment should have been used to the exclusion of the Commission's theory.

Appellant characterizes its theory as a "unit rule" which determines "actual cash value" of a railroad "by consideration of the economic measures of value which are customarily employed in the market place, to-wit: (1) the net earnings of the railroad as a whole capitalized at some realistic rate determined in the light of then existing market conditions and (2) the market value of the outstanding shares of capital stock of the railroad plus the value of its debt— * * *. Sometimes consideration is also given by the tax appraisers in arriving at the value of the railroad to some form of cost, which must be tempered, however, by reasonable allowances for depreciation and economic obsolescence * * *."

Capitalization of earnings, stock and debt, depreciated investment, and an average of these three items (as in C. B. & Q. Exhibit T) have been recognized as criteria for determining the value of railway property. See *State Railroad Tax Cases, supra,* 92 U.S. l.c. 604-606; *Adams Express Co.* v. *Ohio,* 166 U.S. 185, 222; *Chicago & N.W. Ry. Co.* v. *Eveland,* 8 Cir., 13 F. 2d 442, 443 [1, 2]; *Bailey* v. *Megan,* 8 Cir., 102 F. 2d 651, 655[7]; *City of Detroit* v. *Detroit & Canada Tunnel Co.,* 6 Cir., 92 F. 2d 833; *C. B. & Q. R. R. Co.* v. *Dept. of Revenue,* 17 Ill. 2d 376, 161 N.E. 2d 838; *Chicago St. & P., M. & O. Ry. Co.* v. *State Board,* Neb.,

276 N.W. 391. However, in determining an assessment the Commission is not bound by any single formula, rule or method, but is free to consider all pertinent facts and estimates and to give them such weight as reasonably they may be deemed entitled, *Great Northern Ry.* v. *Weeks,* 297 U.S. 135, 139; and an assessment even if reflective of overvaluation will not be set aside unless shown by the taxpayer to be the product of "an intentional plan or design of discrimination" or "so grossly excessive 'as to be entirely inconsistent with an honest exercise of judgment.'" *Cupples-Hesse Corp.* v. *State Tax Commission, supra,* 329 S.W. 2d l.c. 700[6], which brings this case to a consideration of appellant's Point VIII, that this assessment does discriminate against C. B. & Q.

An assessment whereby the property of one taxpayer is knowingly valued at a higher percentage of its value in money than the percentage of value at which another's property is assessed cannot be allowed to stand because such would constitute unconstitutional discrimination. See *Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441; *People* v. *Union Station Co.,* 383 Ill. 153, 163, 48 N.E. 2d 524; *Boonville Nat. Bank* v. *Schlotzhauer,* Mo., 298 S.W. 732, 737; *Jefferson City Bridge & Transit Co.* v. *Blaser,* Mo., 300 S.W. 778, 785; *Columbia Terminals Co.* v. *Koeln,* 3 S.W. 2d 1021; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* Mo., 19 S.W. 2d 746; *Koplar* v. *State Tax Commission,* Mo., 321 S.W. 2d 686.

Appellant's argument is that the Commission's assessment is greater than the 30% level of value intended for assessment of all properties in Missouri for 1966, amounting to at least 51% of the actual cash value of the railroad's distributable property in Missouri, and is thus approximately 70% excessive with relation to other property. This theory presupposes that the railroad's theory of assessment is the exclusive method and that the Commission is bound by its assumptions and values, and by the result, $20,722,000, which it obtains.

The record demonstrates an absence of an intentional plan of discrimination and that the assessment is reasonable and uniform.

In addition to those matters previously stated, there was evidence before the Commission on recent costs of construction of main track which would support track values well above those set for C. B. & Q. by the Commission. A Commission exhibit showed that the value per mile placed on main line, second main line, branch line, and sidetracks of C. B. & Q., compared to 27 other railroads assessed by the Commission, was neither the highest nor the lowest and that the figures were near the average of all railroads and near the values placed on tracks of similar roads. A similar exhibit compared each railroad's valuation of right of way per acre and again the same figure was used for each road except for unique situations such as that of C. B. & Q. in connection with its North Kansas City and St. Louis yards. Other railroads were shown to have similar unique situations, such as Union Pacific in its Kansas City yards, and the various Terminal Railroad yards. An exhibit containing average value of distributable property per mile for each railroad showed an average for all roads of $31,238 compared to $26,035 for C. B. & Q. Mr. Norfleet also valued C. B. & Q. by its Three Factor Formula using figures taken from C. B. & Q. exhibits and arrived at a valuation of $36,612,877. By another exhibit, Mr. Norfleet demonstrated that under the Commission's assessment, C. B. & Q. would pay 14.41% of its taxes on distributable property in Missouri where 15.02% of the C. B. & Q. system is located. By comparison, C. B. & Q. would pay 29.69% of its taxes in Illinois where but 19.15% of the system is located. Similarly, in Iowa C. B. & Q. would pay 13.99% of its taxes on 11.70% of its system. Another exhibit showed average taxes per mile in the fourteen states in which C. B. & Q. operates. Missouri taxes per mile paid by C. B. & Q. of $1,057 compared to the average of $1,050, and the highs of Illinois,

$1,780, and Wisconsin, $1,938. The average was brought down by Kansas which has no C. B. & Q. main line.

Appellant had no evidence to show any of the Commission's values to be inaccurate, excessive or discriminatory, or to refute Mr. Norfleet's opinion that the values used represented a 30% level of valuation as the Commission would hope to achieve on all property. The same methods were applied to all problems of distributable property. Appellant complains of the formula whereby rolling stock is never reduced to 100 percent; however, it is elementary that a railroad car after 15 years, if still in service, is of some value as part of a system.

These are not the circumstances indicative of an intentional plan of discrimination but, to the contrary, are those of a reasonable and uniform assessment.

The judgment is affirmed, and the stay order previously entered by this court in connection with that part of appellant's 1966 assessment in excess of $20,722,000 is dissolved.

ANDREW JACKSON HIGGINS,
Commissioner

HOUSER, C., Concurs.
WELBORN, C., Concurs.

PER CURIAM: The foregoing opinion by Higgins, C., is adopted as the opinion of the court.

All of the Judges Concur.

Judgment of the Supreme Court of Missouri

And thereafter on the 9th day of September, 1968, the following proceedings were had and entered of record in said cause, to-wit:

53500

Chicago, Burlington & Quincy Railroad Company, a Corporation, Appellant,

vs.

State Tax Commission of Missouri, Hunter Phillips, Chairman; Carl E. David and J. Ralph Hutchison, Members; J. R. Towson, Secretary of the State Tax Commission, Respondents.

Appeal from the Circuit Court of Cole County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cole County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellant their costs and charges herein expended and have therefor execution.

It is further ordered by the Court that the stay order previously entered by this court in connection with that part of appellant's 1966 assessment in excess of $20,722,000 be dissolved. (Opinion filed.)

May 24, 1967

BEFORE THE STATE TAX COMMISSION OF MISSOURI

In the Matter of the Assessment of
DISTRIBUTABLE PROPERTY of the
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
for the year 1966.

Findings of Fact, Conclusions of Law and Decision

FINDINGS OF FACT

The State Tax Commission, pursuant to Chapter 151 V.A.M.S., did proceed to assess the distributable property of the Chicago, Burlington & Quincy Railroad Company, located within the State of Missouri as of January 1, 1966, and said Commission did place an assessment of $33,429,871 as the taxable value of the distributable property of said Railroad within the time required by law.

Thereafter the Chicago, Burlington & Quincy Railroad Company, hereinafter referred to as Railroad, did file in the Circuit Court of Cole County, Missouri, a petition and the said Court did on July 8, 1966, in its Cause Number 23106 enjoin said State Tax Commission, hereinafter referred to as Commission, and its members, employees and agents from certifying any assessments to the various political subdivisions in the State of Missouri until further ordered by said Circuit Court.

Said Order was continued until October 17, 1966, when the aforesaid Court remanded it to the Commission for a hearing before it after due notice of the time and place of hearing. The Stay Order issued by the Court on July 8, 1966, remaining in full force and effect until the Court is advised by the State Tax Commission that such hearing has been held and final determination made by said State Tax Commission.

Thereafter the Order of aforesaid Court, dated October 17, 1966, was amended on November 21, 1966 by the Court on motion of the Railroad to read as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for an order remanding this proceeding to the State Tax Commission is sustained. This cause is hereby remanded to the State Tax Commission for a hearing before that agency after due notice of the time and place of such hearing. The stay order issued by this Court on July 8, 1966, shall remain in full force and effect until this Court and the Plaintiff is advised by the State Tax Commission that such hearing has been held and a final determination made by the said State Tax Commission, and for further order of Court.
>
> S/C JAMES T. RILEY
> *Judge of Circuit Court*
> *Cole County, Missouri*"

Pursuant to said Order, the Commission did on January 3, 1967, notify said Railroad that a hearing would be held at 801 Jefferson State Office Building, 100 East Capitol Avenue, Jefferson City, Cole County, Missouri, office of said State Tax Commission of Missouri, at 10:00 a.m., in the forenoon, on February 6, 1967, in the matter of the 1966 distributable property of the Railroad within the State of Missouri, for the purpose of taxation in assessing value thereof as of January 1, 1966.

The Railroad appeared at the time and place designated in said notice, by its Attorneys, John Street, of Denver, Colorado; Richard T. Cubbage, of Chicago, Illinois; Clyde J. Linde, of Kansas City, Missouri; and Forrest P. Carson, of Jefferson City, Missouri; and officers and employees as hereinafter set out, and the hearing was commenced at said time and place. Virgil Wright, General Freight Agent and General Passenger Agent for Missouri, 153

West 14th Avenue, North Kansas City, Missouri; and William Loos, Yardmaster in the State of Missouri, 107 Franklin Avenue, St. Louis, Missouri, appeared pursuant to subpoenaes duces tecum issued by the Commission, served upon them by the Sheriff of their respective counties.

Subpoena duces tecum issued by the Commission for the appearance of Glenn L. Key, Real Estate Manager for Missouri and its Registered Agent, R. B. Langworthy, 300 Union National Bank Building, 900 Walnut, Kansas City, Missouri, ordered their appearance February 6, 1967, at 10:00 a.m., before the Commission and that they bring and produce at said hearing the record of Chicago, Burlington & Quincy Railroad Company of real property owned, improvements thereon, sales and acquisitions of real property within the State of Missouri for the year ending December 31, 1965. Said subpoena served by the Sheriff of Jackson County, Missouri and return made that he had served same by delivering to R. B. Langworthy, Registered Agent for the Railroad Company, a corporation, failing to find Glenn L. Key (employed in Chicago). Neither Mr. Langworthy nor Mr. Key appeared, nor were the records as aforesaid produced for the hearing, the same being Exhibit 5.

The Commission issued subpoena duces tecum to the Railroad Company, and its Vice President and Comptroller, W. N. Wernzen, and its Registered Agent, R. B. Langworthy, 300 Union National Bank Building, 900 Walnut, Kansas City, Missouri, ordering their appearance February 6, 1967, at 10:00 a.m., before the Commission and that they bring and produce at said hearing the records of Chicago, Burlington & Quincy Railroad Company, accounting for purchases and retirement of rolling stock for the year ending December 31, 1965, including, but not exclusively, locomotives, work equipment, miscellaneous equipment, cost of rebuilding 432 cars, and all other rolling

stock in 1965. Said subpoena served by the Sheriff of Jackson County, Missouri and return made that he had served same by delivering to R. B. Langworthy, Registered Agent for the Railroad, a corporation, failing to find W. N. Wernzen (employed in Chicago).

Neither W. N. Wernzen nor R. B. Langworthy appeared, nor did they bring any of said records as aforesaid, this being Exhibit 6.

The Commission issued subpoena duces tecum to the Railroad Company, and its Chief Engineer, E. J. Brown, and its Registered Agent, R. B. Langworthy, 300 Union National Bank Building, 900 Walnut, Kansas City, Missouri, ordering their appearance February 6, 1967, at 10:00 a.m., before the Commission and that they bring and produce at said hearing records of acquisition and costs of right-of-way and roadbed, including ties and rails in Missouri, mileage of track including main line, branch line, side track, switch track, and lead track, in Missouri. Said subpoena served by the Sheriff of Jackson County, Missouri and return made that he had served same by delivering to R. B. Langworthy, Registered Agent for the Railroad Company, a corporation, failing to find E. J. Brown (employed in Chicago).

Neither Mr. Langworthy nor Mr. Brown appeared, nor were the records as aforesaid produced for the hearing, the same being Exhibit 7.

The Commission finds that the refusal of the Railroad and its officers and registered agent to appear, was willful and arrogant and that the Commission was greatly hampered in attempting to ascertain the property of the Railroad for taxation and the value thereof. John Street, General Attorney for the Railroad, 615 Johnson Building, Denver, Colorado, a member of the Colorado Bar, and Chief Trial Attorney in this hearing, stated (Tr. 35) that he had not been in Chicago before commencing this

hearing and had made no effort to ascertain what the records of the Railroad were.

The Commission further finds that the records subpoenaed are kept in Chicago, Illinois and that the officers who did not appear and are in charge of the records are also in Chicago, Illinois; and that the Commission might have struck the Railroad's application for rehearing and sustained the assessment previously made, because of the willful and arrogant refusal of the Railroad and its officers.

All records of the Commission were open at all times to the Railroad's representatives and were examined and photographed by them at will, without and before motion to produce.

The Railroad served subpoenaes upon State Tax Commission employees, Cecil B. Allison, J. R. Towson and Carl A. Norfleet and they appeared pursuant to subpoena.

Broley E. Travis was produced by the Railroad and testified that he was a consulting valuation engineer, a resident of Sacramento, California since October 14, 1924, being employed by the California Railroad Commission, becoming Senior Valuation Engineer and later Assistant Chief until he retired in 1962 from State service; that he made studies of railroads in California, Oregon, and was on loan for a very short time to New York State Board of Equalization, study of procedures in Colorado. Since retirement he had made extensive analyses of state assessing boards in the States of Idaho, Utah and Nebraska.

The Commission finds Mr. Travis had not made a detailed study of the value of the Railroad in Missouri nor had he made a detailed study of any other railroad in Missouri, but arrived at his conclusions and attempted to testify from information supplied him by the Railroad, and attempted to testify that the Commission should use the so-called "unit" method of assessment rather than

Chapter 151 V.A.M.S. in arriving at its railroad assessments. The Commission finds that Mr. Travis was not qualified to testify as an expert on railroad taxation within Missouri; that though he stated he had examined the physical property of the Railroad in Missouri he had no idea of how many bridges the Railroad had across the Missouri River or their value in the State of Missouri; nor did he have any idea or knowledge as to the construction of any railroad right-of-way by the Railroad within the State of Missouri made in the past fifteen years, or of the cost of construction; nor did he have any idea of the cost of rebuilt cars or Diesels or their value at any particular time after being placed in service.

The Commission finds that Mr. Travis' assumption in the capitalizing of income that the remaining life of all property is twenty years, is unwarranted and inaccurate, and unworthy of belief.

Mr. Travis testified that the Railroad had 208 leased cars from information furnished him by Mr. Reedy. Mr. Travis later testified from Page 405 of the Form A Report, that there were 245 leased cars and stated he could not explain the discrepancy of 37 cars. His testimony is not worthy of belief.

Mr. Travis testified he spent five days in calculations and three days in inspection in making the valuation of the Railroad and he did not have any estimate as an expert of the value of the land owned by the Railroad in North Kansas City; and that he was not interested in that detail. Mr. Travis testified that in California valuation of railroads since 1950, only two systems of approach to establish value of railroads were used.—Capitalized income and stock and debt; that historical cost less depreciation of railroads, was not used.

The Commission finds stock approach is not valid in its application to the Chicago, Burlington & Quincy Railroad

Company. Only three percent being publicly held and in 1965, 2,116 shares were sold of a total 1,708,387 shares issued; and that the small percentage of sales does not constitute a market for taxation valuation purposes, being .12 of 1% of the issued stock.

The stock and debt approach is not applicable to the Chicago, Burlington & Quincy Railroad Company.

Witness Travis testified (Tr. 164), practically all the securities including debt were privately held by pension funds, insurance companies and no prices are available, or are occasionally traded over the counter. His term "securities" covered both debt and equity capital.

Witness Travis testified (Tr. 169), that the market value of the Railroad would be $358,000,000, being read from the Chicago, Burlington & Quincy Railroad Report of December 31, 1965, that it has expended in the last three years $308,874,388 on road and general equipment; that in his opinion the Railroad would only have a value of $50,000,000 more than they had spent in the last ten years. The Commission finds this testimony is not worthy of belief.

Witness Travis testified (Tr. 177), for the purpose of his valuation of non-operative property, that he computed the value of the stock owned by the Railroad and the Missouri-Illinois Bridge and Belt at $940,000; and on referring to the ICC report, Page 210, investments shown by the Railroad at $405,000. He used the value of P & I Railroad Company (Tr. 178), $798,000, and on cross examination it should be $1,678,000, the amount now carried. This is corrected by the Witness (Tr. 179) at the prompting of Mr. Reedy, to $3,333,000, as book value of investments at the close of the year. The testimony of the Witness with regard to values of the stocks for his computation purposes was not worthy of belief. The Commission finds the grand total of the book, undepreciated

book of the transportation property to be $1,023,000,000 (Tr. 184).

The Commission finds that the testimony of Broley Travis, as a whole, is not worthy of belief.

J. Edward Connell was produced as a witness by the Railroad. He had been employed as a bookkeeper by the Central Utilities, Inc., St. James, Missouri, since September 1, 1965, and had been employed up to that time by the State Tax Commission of Missouri, as supervisor of advalorem taxes since May 1949. The Commission finds that he was not required to have any qualifications as an assessor and that he did not qualify as an expert; that he was not employed by the Commission on January 1, 1966, the advalorem taxing date.

The Witness, Connell, testified from memory that around the first of July, 1966 for three or four days he visited Bates, Cass, Ray, Henry, Carroll and Johnson counties. (Tr. 202). He had notes made for five counties. He stated, over objection, the level of personal property assessment in his opinion was twenty-five percent or less. The objection to his testimony as to the level of real estate assessments was sustained and he was not accepted as an expert by the Commission.

Witness Connell, stated there was no ratio study of assessments on personal property made by the State Tax Commission of Missouri while he was employed by it, or for the purpose of any assessment purposes.

The Commission finds that the Witness, Connell, did not make any valid study of assessments in 1966 and that his testimony, as a whole, is not worthy of belief.

James P. Reedy, of Chicago, Illinois, General Tax Agent for the Chicago, Burlington & Quincy Railroad Company, for eight years and previously employed by them since 1946 in the Tax Department, testified for the Railroad stating that the Railroad operates in eleven

states, pays advalorem taxes in ten states and gross receipts tax to the eleventh state, (Minnesota) in lieu of advalorem taxes; that he prepares all reports to various state taxing authorities and local taxing; that he is charged with checking accuracy of the levy and seeing that the taxes are paid before becoming delinquent, including the State of Missouri; that as chairman of the National Committee of Railroads and Utility Tax Representatives, which meets once a year to discuss the problems of taxation common to utilities and railroads; that its purpose primarily is to exchange information and discuss new ideas in the field of taxation, litigation and legislation; that he is President of the National Association of Railroad Tax Commissioners which performs the same function as previously mentioned group, entirely in the area of railroads; that this group meets annually; that he is President of the Missouri-Arkansas Association of Tax Representatives, an organization similar to the other two previously mentioned, dealing primarily in advalorem taxation in the States of Missouri and Arkansas; that he is an officer of the Iowa Association of Tax Commissioners which is a regional organization dealing with matters in the State of Iowa. No other qualifications of Mr. Reedy were shown.

Mr. Reedy testified that he received a letter dated June 2, 1966 from the State Tax Commission setting the Railroad's assessment from distributable property in the State of Missouri for 1966 at $34,817,172. Said letter was marked as Exhibit G and Mr. Reedy upon examining it said he didn't necessarily mean the word "tentatively" was in the notice. Exhibit G also notified that the Commission would meet with the Railroad at its office in Jefferson City, Missouri, on Monday, June 20, 1966 and Tuesday, June 21, 1966 for discussion relative thereto; this letter was replied to by Exhibit H, stating that representatives of the Railroad would appear on said date; thereafter Exhibit I was introduced, dated June 23, 1966, notifying the Railroad that the Commission placed a final

assessment of $33,429,871 on the distributable property of that Railroad in Missouri for 1966; said Exhibit is stamped received June 24, 1966 by the Railroad's Land and Tax Department.

Thereafter Exhibit J was introduced, it being Objections to and Against, and Request for Oral Hearing on said assessment in the amount of $33,429,871 pursuant and following a hearing and discussion of the assessment of $34,817,172 dated June 2, 1966 by the Commission, being taxpayer's Exhibit G. Exhibit J was sworn to by J. P. Reedy before a notary public in Cook County, Illinois on July 1, 1966.

Exhibit K was introduced, it being a letter from the State Tax Commission dated July 5, 1966, notifying the Railroad that their request for a hearing received by them on July 5, 1966, is granted, stating:

> "Your request for a hearing, which we have received today, July 5, 1966, is granted and will be heard July 7, 1966, at 1:30 p.m. (DST), here at the State Tax Commission office.
>
> You, no doubt realize that the values have to be certified and in the hands of the counties on July 11, 1966."

The Railroad's stamp of receipt of said letter is obliterated thereon, other than the words "received 1966 land and tax department". Mr. Reedy handwrote on said notice "received 9:15 a.m., July 7, 1966 J. P. Reedy".

Thereafter the Tax Commission received a telegram, marked Tax Commission's Exhibit 14, sent by Western Union 1:17 p CDT, to Hunter Phillips, Chairman, Mo. State Tax Commission, Jefferson City, Missouri; marked received by Western Union July 7, 1966, 1:54 p.m., which reads as follows:

> "Tried unsuccessfully reach you by phone yesterday and this morning. Notice of hearing 1:30 this

afternoon received by me 9:15 a.m. this morning, making it impossible obtain witnesses and counsel to appear today.

Respectfully request that you withhold certification of contested amount of assessment, namely $12.7 million, and give us hearing as to that amount next week. No objection to certification of $20.7 million. J. P. Reedy, General Tax Agent, CB&Q RR Co."

The Commission finds that Exhibit L by the Taxpayer, is not a true copy of the original telegram sent by the Railroad and said original telegram being introduced and being the best evidence by the Commission and marked "Tax Commission's Exhibit 14", above fully quoted. Thereafter on July 7, 1966, the Railroad filed in Circuit Court of Cole County, Missouri, a Petition for Review of the assessment of $33,429,871, dated July 1, 1966. The Commission finds the attorneys and representatives of the Railroad did not appear before it on July 7, 1966, before filing the Petition for Review on July 7, 1966 in Circuit Court, Cole County, Jefferson City, Missouri; this hearing, as previously set out, being held pursuant to the order of the Circuit Court of Cole County, Missouri.

The Commission finds that the taxpayer's Exhibit N correctly states the mileage of main line, main and branch line trackage miles and branch lines in Missouri totaling 1,283.61 miles, but finds it was compiled to confuse the Commission as to the actual condition and age of the construction existing as of January 1, 1966. The Commission finds that Exhibit O, P, Q, R, S, T, U, V, W, X, Y, Z, AA and BB are not original records or verified transcripts of figures appearing on original records of the Railroad; that they are argumentative, inaccurate and not worthy of belief and not considered by the Commission as evidence, as are, also, Exhibits DD, II, KK, MM, NN, OO, PP, QQ, RR, SS.

Taxpayer's Exhibit O, marked for identification depicts the line from Francis Junction, just East of Mexico, Missouri, to Old Monroe, Missouri, as branch line. The Commission finds that said mileage from Old Monroe to Francis is part of the Railroad's main line from Kansas City, Missouri to St. Louis, Missouri; and that Mr. Reedy's testimony or Exhibit is not worthy of belief and is not credible. The Commission finds that at the time Witness Reedy testified with regard to the aforementioned exhibits, he did not produce the records of the Railroad to substantiate the figures and data contained in the exhibits and that the records were not produced pursuant to subpoena therefore. (Tr. 343, 344, 345, and 346.)

Exhibit II was produced and marked. Mr. Reedy testified it was a recapitulation of total Missouri assessments for years 1961 through 1965. This was taken from the Annual Report of the Proceedings and Decisions of the State Tax Commission of Missouri and shows that the taxable wealth for 1961, of the State of Missouri, was $7,995,000,000; for 1962, $8,169,000,000, an increase of 2.17 percent. In 1963, total taxable wealth was $8,460,000,000, an increase of 3.56 percent over the total for 1962. In 1964, the taxable wealth was $8,743,000,000, an increase of 3.34 percent over the previous year. In 1965 the total taxable wealth in the State of Missouri was $9,061,000,000, or an increase of 3.64 percent over taxable wealth of previous year. The Witness did not offer figures for 1966 but Counsel produced them at the request of the Commission and this was marked Exhibit JJ, which indicated an increase of one-half billion dollars taxation for 1966 in Missouri without the assessment of the Chicago, Burlington & Quincy Railroad Company, said assessment having been enjoined by the Circuit Court of Cole County, Missouri.

Witness Reedy testified (Tr. 365) that there was a twenty percent increase from 1961 through 1966; that this

in dollars and cents in 1963 and 1964 was $280,000,000 to $300,000,000; 1964 to 1965, $318,000,000; 1965 to 1966, an increase of $497,000,000; that the increase from 1965 to 1966 was $200,000,000 more, or an increase of 80 percent, rather than 25 percent previously testified to. (Tr. 367). The Commission finds the testimony of Mr. Reedy is inaccurate, deceptive and not worthy of belief, as are exhibits previously so found on which his testimony was based.

Mr. Reedy testified as follows: (Tr. 372)

"MR. BRANNOCK: I want to ask some questions preliminary to a possible objection.

Mr. Reedy, will you read over to yourself paragraph B in Exhibit KK?

WITNESS REEDY: Yes, sir.

MR. BRANNOCK: Do you say that that is a true statement of the procedure of the State Tax Commission of Missouri?

WITNESS REEDY: To the best of my knowledge, yes.

MR. BRANNOCK: Are you using this as a factual statement or is it true?

WITNESS REEDY: Excuse me. I was reading B. In fact, I was relating it to the overall procedure.

MR. BRANNOCK: I asked you to read paragraph B. Is that paragraph true?

WITNESS REEDY: No, I have indicated in the paragraph that there have been changes from Missouri Commission procedures.

MR. BRANNOCK: I just asked you one thing: Is it true or untrue?

WITNESS REEDY: It is not the procedure used by the Tax Commission."

The Commission finds that the testimony and Exhibit KK are not worthy of belief.

Witness Reedy stated (Tr. 380) that taxpayer's Exhibit B-3, from which Mr. Travis previously had testified, was prepared from figures Mr. Reedy furnished Mr. Travis. However, Mr. Reedy did not produce the original records of the Railroad to substantiate the figures used in Exhibit B-3. The Commission finds the exhibit and testimony in regard thereto of both Broley Travis and Mr. Reedy are not worthy of belief.

Taxpayer's Exhibit MM was testified from by Mr. Reedy and said exhibit and testimony based thereon is found by the Commission to be of no value and not worthy of belief for the reason that records of the Railroad were not produced to substantiate said exhibit or testimony with regard thereto. The merger agreement was not produced; the testimony of Mr. Reedy concerning merger agreement and the value of the Railroad was hearsay, not the best evidence, and totally unsubstantiated. (Tr. 389, 390, 391, 392, and 393).

Mr. Street stated (Tr. 394) that the merger, referred to in the previous exhibit and testimony, had been rejected by the ICC; after objection has been made to such testimony and the exhibit stating that the merger referred to had been rejected by the ICC.

Mr. Reedy's testimony in this regard is not worthy of belief for up to that time he did not divulge that the merger had not been effected and based his entire testimony and exhibit from a transaction that had never been consummated.

There was a discrepancy in the number of leased cars under the heading "Equipment Leased from Others" (Tr. 396) of thirty-seven cars which were not reported to the State Tax Commission of Missouri but were reported to

the ICC on its Form A, the latter being 245 leased cars and the former being 208 leased cars.

Witness Reedy also stated (Tr. 397, 398 and 399) that twenty-five cars leased from Fruit Growers Express Company are not shown in the report to the State Tax Commission of Missouri; and twelve freight cars which appeared on ICC, Form A, that were not reported by the Railroad to the State Tax Commission of Missouri, being leased from the General American Car Company.

Mr. Reedy also stated (Tr. 399, 400, 401, 402, and 403) that the Railroad was leasing twelve Diesel locomotives; that he had just the day before found a discrepancy in not reporting them to the State Tax Commission of Missouri and that their locomotive fleet contains twelve more units than he had reported for 1966 tax purposes in Missouri.

The Burlington Refrigerator Express Company is a wholly owned subsidiary of the Chicago, Burlington & Quincy Railroad Company; the first paid the latter $2,197,000 in 1965 under contract of rental—such charges are determined between the parent and the subsidiary and are not set by the ICC. (Tr. 448, 449) Witness Reedy testified that it was deducted by Mr. Travis on Exhibit B-3. The value of non-operative property on taxpayer's Exhibit B-3 is $135,763,000.

The Commission finds that the "Petition for Rehearing" was subscribed and sworn to by Mr. Reedy in Chicago, Cook County, Illinois on Friday, July 1, 1966, and because there was no mail delivery on Saturday, July 2, Sunday, July 3, and Monday, July 4, 1966, a holiday, it was not received until July 5, 1966; and that the Railroad was notified in writing on July 5, 1966, that hearing would be had on July 7, 1966, 1:30 p.m., at which time the Railroad nor any of its attorneys, agents, officers or employees appeared before the Commission, nor did they appear at any time during that day; that on July 7, 1966, Chairman Phillips of the State Tax Commission of

Missouri did answer a phone call left for him by Mr. Reedy on July 7, 1966 at the Commission's office, but Mr. Reedy was not available to speak to him. Mr. Reedy stated (Tr. 454) that he was in Chicago and had the operator place the call to the Chairman on July 7, 1966.

Referring to Exhibit O for the year 1957 and the year 1966, the assessment per mile for the ten states listed therein was not given. Mr. Reedy had no record of the mileage to testify from. (Tr. 456).

Mileage used in the ICC Report, Exhibit 11, Page 401, Schedule 412, Column H, is the total of all miles of all types of tracks, of all types of mileage. (Tr. 456).

A lower Assessment valuation can be offset by a high tax rate and vice versa, Mr. Reedy agreed. The Commission finds that the valuation of taxable property is not solely determinative of taxation but must be considered with, and the tax rate applied thereto, to ascertain the actual taxation, and the number of dollars paid in taxes. The levy against per mile of track for the year 1965, using Schedule P, shows the total taxes paid. (Tr. 461). The resulting computation computes the tax per mile of road operated in ten states through which the Railroad operates. The tax cost per mile in the State of Missouri is $1,135.66. (Tr. 462).

Colorado	$1,022.04
Illinois	1,833.51
Iowa	1,414.40
Kansas	361.67
Montana	799.40
Nebraska	852.97
South Dakota	414.33
Wisconsin	1,964.89
Wyoming	1,128.03

The main line in the State of Kansas is 12.85 miles, the branch line in the State of Kansas is 187.02; trackage

miles operated in Kansas, total 18.12, or a grand total of 218 miles operated in Kansas of which 12.85 are main line.

On cross examination (Tr. 468) with regard to Exhibit Q, entitled "1965 Freight Revenue Per Mile of Line operated in Missouri", the revenue per mile of the Railroad is shown to be $21,177; and that of the Santa Fe Railroad Company is shown to be $92,582. The Witness stated (Tr. 468, 469) that he agrees with the cross examination of question; that the industrial district of the Railroad in North Kansas City generates or originates more freight than at any point on the Santa Fe Railroad in Missouri and that would be true because the Santa Fe has practically all main line miles across the State of Missouri, a "bridge state". The Santa Fe has no yards in Missouri; the only large city they pass through is Kansas City and their yards for servicing Kansas City are in Wyandotte County, Kansas. The Santa Fe passes through Kansas City, Missouri on the Kansas City Terminal Railroad tracks. The Southwest Terminal of the Burlington Railroad, of all the line they own in Missouri, is in North Kansas City, Clay County, Missouri. The Witness agreed that the Railroad had more freight into Missouri than the Santa Fe, yet the Railroad's Exhibit Q indicates revenue of $92,582 per mile for the Santa Fe Railroad and $21,177 for the Chicago, Burlington & Quincy Railroad.

The Witness did not produce records or facts to substantiate Exhibit Q, and the Commission finds it is not worthy of belief, nor the testimony given therefrom worthy of belief.

On cross examination, the assessment of the Railroad per main line of mile is shown to be $20,000; the Missouri-Kansas and Texas—$16,000; the Missouri Pacific—$20,000; Norfolk & Western (leased from Wabash)—$20,553; St. Louis & Southwestern—$23,535; Santa Fe—$26,250.

Witness Reedy stated (Tr. 473), that the road bed condition of the "Katy" is not comparable with the Chicago, Burlington & Quincy Railroad.

The Railroad constructed 79.35 miles of main line between 1948 and 1950 on its Kansas City-Chicago short line within the State of Missouri. The best recollection of the Witness was that it cost $18,000,000. He had no record of the Railroad with him, on the exact cost. The Commission finds, from Witness Reedy's best recollection, that the cost of the eighty miles of rehabilitated and new line in Missouri constructed in 1948-1950, was approximately $16,000,000, or $200,000 per mile.

The Railroad returned wire line to the State Tax Commission of Missouri at $283 per mile. Witness Reedy testified he did not know how much the Railroad had expended on its communication system in the last year. When questioned on cross examination if he knew of any place in Missouri where tax had been paid on the communications system, Witness stated this was included in the Tax Commission's valuation per mile for roadbed and superstructure.

Witness Reedy testified (Tr. 487) that 97% of Chicago, Burlington & Quincy Railroad is owned equally between the Great Northern and Northern Pacific Railroad Companies; that of the total outstanding shares, 1,708,387, in 1963, only 2,000 were traded in. The Commission finds this does not constitute a market to be used in computing value of the Railroad; that 97% ownership of a corporation constitutes effective control of said corporation, its dividends, its expenditure of money for salaries and that it would affect the selling price of any available shares that might be offered for sale; that only 48,000 shares are available, those being the number not owned by the Great Northern and Northern Pacific; that only one employee, or director, is a majority shareholder owning 110 shares of the Company.

On cross examination, referring to taxpayer's Exhibit P, Item 3, the Witness did not give consideration to appreciation of the increased value of land over acquisition price; some of which was acquired over one hundred years ago. Witness Reedy further stated (Tr. 493) that much of the land they operated over, they have operating deeds only, that is, when they ceased operating the Railroad the land reverts to property owners; that there is some question, Counsel advised, as to whether or not the Railroad has title to any of its right-of-way in the State of Missouri; that the Railroad has no revisionary right to this land and that it actually has no value other than the easement value to operate the Railroads; that land in St. Louis City (Tr. 494) purchased back before the turn of the century along the River had a tremendous value; since that day the value has depreciated quite considerably.

The Commission finds this testimony of Mr. Reedy not worthy of belief.

On cross examination, the Witness stated that the lands in the Murray Yards in Kansas City are not owned in fee title. The Commission finds this statement is not worthy of belief.

Witness Reedy testified the Railroad retains possibly 145 acres of land acquired in 1947, as non operative property as distinguished from operating property; that on the report required to the Commission in 1966, it is shown of acquisition price only as $213,970; and that it was shown on the 1966 report to the Commission as its value. Witness Reedy testified that 199.83 acres have been typed into the report to the Commission. The Witness stated that 16.62 acres of right-of-way land were reported to the State Tax Commission of Missouri in 1966 as a part of the 16,343.35 acres that were reported as right-of-way in Missouri; that the value as shown on the report is $52.86 per acre; that the non-operating property in Clay County

had been sold at $14,000 to $15,000 per acre and that he, for the Railroad, put a value on the 16 operating acres of this same addition of $52.00 an acre.

On cross examination, Witness Reedy stated (Tr. 506) the assessment on land held by the Railroad for industrial property is roughly $375.00 an acre, on land that sells for $15,000 per acre; that "it is a specific type of property and it would have a tendency to distort the results of a study." (Ratio study.)

On cross examination, Witness Reedy stated that Murray Yards is the West operation of the Railroad in North Kansas City; that the Railroad gave title to ground in North Kansas City not in the Paseo district and reserved easement rights for train operations.

Witness Reedy stated (Tr. 513), "The steel companies say the price of steel is less today than it was 50 or 100 years ago." The Commission finds that this is not worthy of belief. It takes judicial notice of the large increase in steel and all prices in the last 50 or 100 years.

The Witness did not answer a question as to whether appreciation of repairs they have made to the cars is shown in any of their exhibits. (Tr. 515). On cross examination, Witness Reedy testified (Tr. 518-519) that there were 835 cars built in 1965 in Railroad shops and that 651 cars were purchased, or a total of 1,486 put in service in 1965. This, added to the 432 cars purchased from the Chicago Freight Car Company, totals 1,918. He testified (Tr. 519-520) "Many of these cars will be purchased or built, but they will not be getting into our accounts during the year 1965;" that he showed in his report to the State of Missouri 1,785 cars. The Commission finds that 133 new cars placed in service in 1965 were not reported to the State Tax Commission in the Railroad's report to the Commission.

Witness Reedy was unable to substantiate Exhibit Z, headed "Age of Commercial Freight Cars", which gave

number of units as 44,909, while on taxpayer's Exhibit NN the total units owned by the Railroad, year ending 12-31-65 was 43,157, which coincides with the number of units reported to the ICC as of the same date. Mr. Reedy then testified the difference might be in cabooses and on referring to Exhibit NN, 417 cabooses were shown as freight train cars. Mr. Reedy was unable to explain the difference in the figures and the difference in the exhibits and said he would have to go to the records of the Railroad which he had not brought pursuant to subpoena duces tecum. He further testified on Exhibits 1-A and 1-B, reporting a total of 40,369 freight train cars (Tr. 523) and was unable to reconcile that figure or explain the difference between it and the other two exhibits other than that the 40,369 shown on the State Tax Commission Form 1-A and 1-B does not include 2,741 refrigerator cars, 30 insulated box cars, or a total of 2,788 cars. He admitted there was a discrepancy of 2,788 cars in his exhibits. (Tr. 524).

In attempting to explain the discrepancy in the number of cars, Mr. Reedy stated "Exhibit Z was prepared not based on the number of cars of 12-31-65." "We were not particularly interested at the time of the preparation of this as to the accuracy of number of units." The Commission finds that the exhibits prepared for testimony before the Commission and the testimony of the Witnesses Broley Travis and James Reedy therefrom, are not worthy of belief.

Mr. Reedy testified, (Tr. 526-527) referring to the ICC Report on Page 405, that this is units owned, including investment account and leased cars; in Column B, is the total of units in service at the beginning of the year, 1966 and in Column C, the new units purchased or built; and Column E, is rebuilt units acquired and rebuilt units rewritten into property accounts 432; that in adding Column C and E the total 1,783 cars and Account F, are units that are purchased or leased from others.

Mr. Reedy further testified (Tr. 529), that the Railroad's report to the State Tax Commission "is not correct by the 12 cars".

Mr. Reedy was asked (Tr. 530) if there was any way that the figures given to the Commission could be reconciled with the report to the ICC. He made no answer. He was asked also if the Exhibits NN and Z could be reconciled with the ICC Report. He made no answer. On further cross examination, (Tr. 530 and 531) he answered he could reconcile Commission Form 1-A and 1-B with the ICC Report, but he then immediately stated, "Well, I can have the work done and the reconciliation brought to you at a later date. . . ."

With reference to the ICC Report, Page 404 (first testified to at Tr. 526), Column G, entitled "Units Retired from Service", the Witness was unable to explain the 931 cars listed in that category; and he did not have the information as to how or why he used such number.

Mr. Reedy testified (Tr. 533), in his form filed for 1965, to the Commission, he confirms that said return showed 835 units as cars built in 1959; in return filed in 1966, the number of units constructed in 1959 were shown to be 931 units. He was asked to explain the difference of 96 cars. He stated, "this difference would have to be checked with our records in Chicago to find out why this came about. I cannot answer that." (Tr. 534).

Mr. Reedy stated (Tr. 535) there would be some "carry-overs" of equipment that had been received but not accounted for.

Witness Reedy testified (Tr. 536) that in the 1965 report, 1,485 cars were shown for 1964 construction; that in the 1966 report he showed 1,529 cars of 1964 construction. The number of cars taken out of service by their 1966 ICC Report, is 2,144. (Tr. 537).

Mr. Reedy was cross examined concerning Taxpayer's Exhibit T, Depreciated Investment in Transportation, of $714,821, and stated those expenses are taken out of current expenses. He was also referred to the ICC Report on Page 306, and was asked the amount the Railroad spent in the year 1965 for the repair of Diesel locomotives, to which he replied $11,419,096. They operate 618 Diesel locomotives all of which is charged directly to expense and nothing to improvements of the operating equipment. Witness Reedy was asked (Tr. 538) what was expended by the Railroad on freight train cars, referring to repairs, and his answer was $12,418,716; and none of it had been added to capital improvement accounts, nor does any go into the Railroad's investment and transportation account. The same is true of passenger train car expenditures of $5,063,889.

Mr. Reedy was referred to Commission's Exhibit 12, the "Annual Report of 1965", Page 3, and stated that the gross capital expenditures showed thereon for new equipment was $39,633,981. Mr. Street, Counsel for the Railroad, called this answer to the attention of the Witness who then said that "road in general", in ten years spent some $90,742,175; that these were expenditures in the road accounts of the Railroad, 1 through 47, those being ICC Account numbers. He was asked if this was added to the Railroad's capital improvement account as shown by the Railroad's investment and transportation property as of 12-31-65, and he gave no answer. He was then asked if it included expense items or accounts, to which he stated, $4,975,000 would have been amounts added to the book capital accounts of the Railroad in 1965; and that the $90,000,000 would have been added to the Railroad's road accounts in the ten year period.

On cross examination he further stated that in ten years the Railroad spent $308,874,388, which would go into the transportation account; that $308,000,000 had been added

over a ten-year period and the depreciated capital account of the Railroad is shown on their books as $714,000,000.

Witness Reedy testified (Tr. 546) they had been reporting to the Commission that the Railroad had 99.45 miles in Clay County and a re-check showed 96.75 miles; there was also the same discrepancy in Jackson County; that the total mileage for the state does come out with the mileage that the Railroad reported as the total side track in the state.

Mr. Reedy was referred back to Exhibit T, Column V; he quoted statements of previous Commissions; other members of the Commission's staff, newspapers and legislators. The Commission finds that this is not the proper method in which to arrive at an equalized figure of 30%. Mr. Reedy testified (Tr. 549) that the ratio studies he had seen indicated that 30 percent is a general level of the equalization on a statewide basis; and that he had seen no ratio studies with regard to the assessment of equipment in the State of Missouri; that he did not know the assessing practice of the three larger subdivisions in Missouri with regard to equipment; that equipment of the Railroad is depreciated to 25 percent of original cost over a fifteen year period and then 47 percent is taken on that figure, leaving, roughly, an assessment of 11½ percent, and off that amount was taken an economic adjustment factor.

On cross examination, Mr. Reedy stated (Tr. 556) it was a general conclusion that personal property is not assessed at more than real estate; that this was arrived at by discussion of this matter with others.

Mr. Reedy testified (Tr. 559) he could not give the basis for the $700 value he turned in for a 1965 Ford with closed cab, 64.8 horsepower, 8-cylinder, 4-ton truck; nor how a $10,000 or $12,000 truck could be assessed, in less than a year, for $700. He stated that he turned in for $200 as a minimum assessment, a 10-ton trailer with steel

siding, 23 feet 8 inches long, 1959 model; that he did not take the value off of any records, or books or depreciated cost, or original cost of equipment.

Witness Reedy testified (Tr. 564) in his filing with the Burlington Truck Line of North Kansas City, he did not use any cost, original cost, depreciated cost, book value or any other manner in attempting to set the value turned in for assessment; that the filing was the same as in the other counties he had looked at. The Commission finds that Mr. Reedy put a valuation of $9,000 on ten new trucks purchased in the year 1965, for a value, January 1, 1966, without going to any guide book, without comparing with the records of the Burlington Truck Lines to find what the depreciated value would be, without attempting to find the original cost; that it was a judgment decision on his part as to the taxable value and would be comparable with the taxable property of other property in the jurisdiction. The Commission finds that Mr. Reedy's return of taxable property herein referred to, under oath, is not worthy of belief.

The Commission finds that it issued an automobile assessment book for use by the assessors of the State of Missouri for the valuation of automobiles and automotive equipment as of January 1, 1966, Commission's Exhibit 13; that Mr. Reedy said he knew of said book (Tr. 567) and that he did not pay any attention, or follow this valuation book in making his returns of such equipment.

The Commission's inquiry as to returns of all types of property, including automotive equipment, was also made to test the veracity of the Witness and the exhibits from which he testified; that the Commission finds that the testimony, exhibits and returns made by James P. Reedy, Tax Agent for the Railroad, are not worthy of belief and are not credible.

Mr. Reedy produced maps (Tr. 569) showing the Railroad's ownership of land in the State of Missouri and

thereon is marked "Indicates fee simple property". Such ownership being shown in red on the maps so produced by the Railroad.

Mr. Reedy identified Commission Exhibit 14 (Tr. 571) as being the telegram dispatched out of Chicago by him via Western Union Telegraph, at 1:17 p.m., central daylight time, and received at 1:54 p.m.

Mr. Reedy testified with regard to taxpayer's Exhibit U, headed "Chicago, Burlington and Quincy Railroad Company—1966 Missouri Assessment based on Iowa Formula"; that it showed that the assessment of the State of Missouri, if the Iowa practice had been followed, would be $21,106,894; that the equalizing factor in Iowa is 27 percent.

Mr. Reedy was cross examined, (Tr. 573) with regard to "Adjusted Net Railway Operating Income" and explained that the Railroad reports the net railway operating income as certified to the ICC and certain adjustments are made to the reported net railway operating income to reflect items that are carried as operating income in the ICC report, "or that are not truly operating income items. They are more closely related to non-operating income." The Witness stated that as an example, the lease rental income received by the Railroad from Burlington Refrigerator Express does not involve itself in the operation of the Railroad; that refunds of taxes from Illinois for 1961-1965, used in the average of net railway operating income which increased the net income by that amount should not have been included in ICC Account 532.

On cross examination regarding taxpayer's Exhibit T (Tr. 573) and taxpayer's Exhibit V, and the difference of average net operating income between Exhibit T and Exhibit V, which resulted in a net railway operating income difference of $1,775,000, the Commission finds that the Witness attempted to mislead the Commission by using

taxpayer's Exhibit T and Exhibit V and that they were not worthy of belief; that the amount of dollars difference, (Tr. 574) between the value as shown for the system on taxpayer's Exhibit T and Exhibit V is $49,452,000; that using the average for Missouri at 15.02 in both exhibits produced a difference allocated to the State of Missouri by each formula. The Witness stated that the stock and debt value alone differential is 7.4 million dollars; that the difference of Item No. 3, the "Net Investment in Plant", and the one for Missouri using the Iowa Formula, is $8,000,000 (Tr. 576); that there has been no appreciation shown in the Railroad's reports from the original purchase of the land. (Tr. 579).

On cross examination (Tr. 583), Mr. Reedy had been asked to determine the tax dollars that would have been paid in the State of Iowa, using the formula as developed for the State of Missouri, by their procedure, and in answering he referred to taxpayer's Exhibit V, stating that if the Iowa tax rate were applied against the value determined under the Iowa formula, for the State of Missouri, as equalized at 30 percent, the taxes would be $1,615,000; that the $21,106,000 assessment, when the Missouri average rate of $4.02 is applied, produces $848,500 of taxes; a difference of approximately $775,000, ($766,500).

On further cross examination, Mr. Reedy was asked to compute the assessment of the State of Missouri to bring it to the same amount as arrived at by the State of Iowa, on the same assessment, and stated, "Well, it would have to be close to double." (Tr. 584.)

The Commission finds that the yield of given tax dollars can be many combinations of assessments and levies,—a high assessment, a low levy—a high levy and a low assessment—will yield the same amount of tax dollars.

Witness Reedy stated that in Iowa the Railroad is equalized at $7.65 rate and in Missouri at $4.02 rate.

On cross examination (Tr. 590) Witness Reedy was referred to taxpayer's Exhibit U and stated that based on the Colorado Formula, the Missouri assessment would be $18,288,556. Applying the Colorado tax rate of $5.63 to that taxable value produces a tax of $1,029,645. Applying the Missouri rate of $4.02 to that taxable value as equalized, produces a tax of $735,200.

Applying the Colorado Formula to taxpayer's Exhibit U, Mr. Reedy was asked to explain where he obtained the figure of $405,871,000, as shown on Line 4. (Tr. 592). He stated it was a weighted arithmetic figure (Tr. 593), when asked to explain the figure of $60,961,855, represented to be the Missouri market value allocated at 15.02 percent; that it was a "weighted" system value. (Tr. 594).

Referring to Taxpayer's Exhibit V, under the Iowa formula, the Witness was asked what the Missouri market value would have been and he stated $70,356,316. He was referred to taxpayer's Exhibit W and asked what the full value, equalized at 30 percent under the formula, would be allocated to Missouri and he stated it would be $58,907,715. (Tr. 595). He was referred to taxpayer's Exhibit T and asked about, what he called, "Average Above 3 Factors" allocated to Missouri, would amount to and he stated $69,072,000. The Commission finds there was a great discrepancy in the exhibits and the deduction made therefrom, by Witness Reedy.

On cross examination, Mr. Reedy was referred to taxpayer's Exhibit W, the 1966 Missouri assessment based on the Nebraska formula, and he stated he had no reason for not following, in "A", the net operating income and that this was a reversal; (Tr. 597); that the stock and debt value was $403,144,000, (Tr. 598), compared with taxpayer's Exhibit T, which shows a system market value of $343 million. Mr. Reedy's attention was called to taxpayer's Exhibit V which reflects a stock and debt value of $293,-

154,000 and he testified that the difference between it and Exhibit W, for the same items, was $110 million (Tr. 598).

The Witness was referred to Item B, of Exhibit W, and asked to explain how it was arrived at. He stated it was an average over a four year period, 1962 through 1966, of operating income, then capitalized at 7 percent to produce a system indicated market value under the capitalized income approach; and that this produced $100,000,000 less than was shown on other Exhibits T, V, U. (Tr. 600) The Witness stated that using the Nebraska formula, application of the Nebraska rate of $6.57 to the equalized full value of the property of $17,672,000, produces a tax of $1,161,000; that utilization of the Missouri rate thereto, produces a tax of $710,410.

On being referred to taxpayer's Exhibit X, Mr. Reedy stated that $714,821,070 represents the amount shown on the Railroad's Form A report as depreciated investment in road and equipment or transportation property. Mr. Reedy stated he did not have depreciation schedule (Tr. 603); that the steam locomotive investment is $346,382, undepreciated, as shown on Page 221; and as shown on Form 1-A and 1-R, filed with the State Tax Commission Report, the amount is $287,565. The Witness was unable to reconcile the discrepancies in the figures contained in the two reports. (Tr. 604).

Witness Reedy was referred to taxpayer's Exhibit X and stated that property sales in the industrial district, (North Kansas City, Clay County, Missouri), has been selling at $15,000 an acre; that he did not know the amount of profit upon such sales; that right-of-way in North Kansas City is valued at $52.00 an acre; that in the Murray and Harlem Yards there are 224.47 acres; (Tr. 610); that the main line right of way through the Murray Yard is included in the 224.47 acres in the Murray and Harlem Yards. The Witness stated (Tr. 612) that the Railroad has 107.67 acres in St. Louis City; that the Railroad owns other

real property than this acreage; that the records of the other acreage would be in [Kansas] Chicago; (Tr. 613); that the map given the Commission of the St. Louis City properties is an accurate map. The Witness stated he could not give any examples of depreciation of land in the City of St. Louis; that he had left it in Chicago; that such records were subpoenaed but were not at the Hearing. (Tr. 613). Witness Reedy was asked if there had been any attempt to determine if there had been a gain when he reported to the Commission an? he stated he had not taken that into consideration.

Witness Reedy stated that purchases at Palmyra (Missouri), during 1965 and 1966, amounted to 165 acres, an average of $489.39 per acre; that there was a purchase in North Kansas City by the Railroad of .34 of an acre for $297.00; that 218 acres were sold between Cameron and Kearney, (Missouri), at $56.28 per acre, being abandoned right-of-way. He was unable to state whether the property had a reversionary clause in deed of acquisition; that even if property reverts, people come along and buy up a deed from the Railroad in order to get a perfectly clear title; that there are some abandoned miles from Green City to Milan, (Missouri), at $20.83 per acre. He was asked if there had been any abandonment in Jackson, Clay, Buchanan or St. Louis City and stated there was some North of Liberty, in Clay County, on the Cameron to Kearney line, around Holt. The Commission finds such was rural branch line and side track.

The Witness stated (Tr. 619), that the majority of the Railroad's 432.56 miles of side track in the State of Missouri, is located in major metropolitan areas in which the Railroad has yard facilities—Clay and Buchanan Counties, St. Louis City and West Quincy, Marion County all in Missouri, consisting of 55.98 miles in Buchanan County; 99.63 miles in Clay County; 14.47 miles in Jackson County; 41.08 miles in St. Louis City; 8.28 miles in St. Louis County.

The Witness stated the side track located in the foregoing five counties had the same value as the side track in the outstate area of Macon, Brookfield and Cameron; but that he did not believe that the amount of income generated therefrom had any relevancy. (Tr. 620-624).

The Commission finds that Mr. Reedy's statement that side track in the five counties had the same value as outstate Missouri, is not worthy of belief.

Mr. Reedy was referred to Page 220, of 1965 Annual Report of the Railroad, Commission Exhibit 12, and was asked where the two-way radios, place in 51 locomotives, were turned in for tax purposes; and he stated that he could not specifically state whether they had been turned in for taxes and that his answer would also apply to all communications within the system. (Tr. 624-625). He further stated that they were nowhere itemized that he knew of, in the report to the Commission. He stated the Railroad purchased 12 locomotives in 1965 for $1,579,878. (Tr. 627). He stated that 51 radios were placed in older locomotives; that when asked for comparison of the cost, turned in on locomotives to the State Tax Commission, that he "did not" make any change in the figures. (Tr. 628-629). He was unable to state where "Dispatcher-Controlled Wayside Radios were installed at nine locations between Quincy, Illinois and Kansas City, Missouri", Annual Report, Tax Commission Exhibit 12, after referring to Page 22, of the Chicago, Burlington & Quincy Railroad Company's 1965 Annual Report, or that they had been reported and taxes assessed thereon in Missouri in 1966.

Mr. Reedy was next referred to Exhibit PP (Tr. 632). 800 box cars had been sold to the Chicago Freight Car Company at $400 each, totaling $320,000, during the year at a flat price of $400 each irrespective of the year of construction, from 1940-1947 inclusive. These cars were taken out of the reporting accounts to ICC and the Commission. The Witness further testified (Tr. 634) that a Diesel ac-

quired in 1947 carrying total $163,734 investment, was sold for $20,500; that $163,734 represented the total investment in that piece of equipment from date of acquisition to date of disposition, all betterments and all additions, such as radio and the like, would be shown in the $163,734 figure.

At (Tr. 637-640), Mr. Reedy was asked about Exhibit UU with regard to leased cars and stated that the Railroad was charged the same lease rate for a car constructed in 1927 as for a car constructed in 1953; and that all such cars were were usable and in service. The Witness again stated that twenty-five cars were leased from Fruit Growers Express Company which were not turned in to the State of Missouri for tax purposes, and later stated they were not reported in a rider to the report to the Commission. (Tr. 641).

For the purpose of ascertaining the veracity of the Witness and the accuracy of reports filed in the State of Missouri, Mr. Reedy was asked (Tr. 644) to produce a copy of the returns and he did produce St. Louis City, Clay County, Hannibal (Marion County), St. Joseph, (Buchanan County); but on questioning was unable to show trucks, etc. had been reported and assessed in Missouri, although used or dispatched from fourteen or fifteen points in Missouri. The Witness stated (Tr. 648) that he filed in North Kansas City, Clay County, Missouri, a personal tax return listing $400 for desks, chairs, typewriters, business machines, etc., and that the $400 figure was an arbitrary figure. The Witness stated (Tr. 650) he had no knowledge about how much shop equipment was in Clay County, Missouri, gasoline, nor the number of typewriters, or offices, or time clocks; that he had not made a personal inspection before making a judgment figure of $400 on property in Clay County, Missouri. (Tr. 651-652).

Mr. Reedy was asked (Tr. 653) for the record of the Railroad's equipment cost and depreciated value as turned in for assessment purposes in Clay County and Buchanan County and St. Louis City, Missouri and all other counties where returns had been made.

The Witness stated (Tr. 656) that lubricating oil and other supplies in North Kansas City at $16,660 are stocks on hand in North Kansas City at the Murray Yards for use in the operations there. He was unable to give the Commission any specific information as to amount of equipment or property. (Tr. 657-658).

The Witness referred to the Railroad's report to the Commission for 1966, (Tr. 659) reporting the Railroad had a total of 16,343.35 acres of right-of-way. He was asked if there was any reversionary clause in any deed or title to land owned by the Railroad in Murray Yards, on such land having been reported in Missouri at $52.00 an acre, and stated he had not inspected the deeds but that he had, nevertheless, set the value of the land at $52.00 per acre; that he had no knowledge of any abandoned right-of-way in the Murray Yards (North Kansas City, Clay County, Missouri). He did state that adjacent to their Harlem area, Murray Yards, the Railroad made some sales several years ago on approximately twenty acres, at $5,000 and $6,000 an acre; that they presently own no industrial property adjacent to Murray Yards—it all having been sold by the Railroad.

The Witness was questioned (Tr. 663) with regard to property in St. Louis and stated he had no knowledge of the present value of the property in St. Louis. Mr. Reedy stated (Tr. 666) that for original cost in the Form required by the Commission, in its report, he had not filed original cost less depreciation, because "there has never been any specific instructions to that effect." (Tr. 667). He further stated he had been reporting 30 percent of the depreciated value of structures and that is the figure that he had determined as the value; that the same procedure was followed for Accounts 16 through 35 (ICC Report); that Account 35, "Miscellaneous", consists of miscellaneous buildings along the right-of-way; that this would be all buildings except those listed in 16, 17, 18, 19, 20 and 31.

The Commission finds the return figure of $273,000 to not be worthy of belief.

Witness Reedy was asked concerning twelve locomotives previously testified to, and not reported to the Commission for taxation, and stated they should have been reported as leased equipment and should be taxed. (Tr. 669-671).

Witness was questioned regarding trailers and stated they were shown on the ICC Report, Page 414, as "company vehicles"; and also was asked concerning 1,087 "trailers and semitrailers", which he stated were piggyback trailers and carried under the heading of miscellaneous equipment in their return to the State of Missouri; that it had been returned to the State of Missouri for taxation on Form 1-C, Miscellaneous Equipment, in the total of $10,870,000, and a total of 1,812 units. The Witness stated that the Railroad had not paid any taxes on any piggyback equipment in Missouri; that the 1,087 trailers and semitrailers were included in the total value of all equipment shown in Form 1-C, revenue and non-revenue, in the amount of $10,870,379, which represents all equipment as carried in Account 58 (ICC Report).

The Witness stated containers, (the character of which is explained at Tr. 677) are a part of the miscellaneous equipment (Tr. 678) and that the State of Missouri has not been collecting tax on any containers, the same as on trailers, nor had any tax been paid in Missouri on bogies (the character of which is also explained at Tr. 677).

Mr. L. Glenn Key was allowed to testify out of turn (Tr. 680) before Mr. Reedy's cross examination had been concluded, and he was called as a Commission witness. He is General Land Agent for the Railroad, also for the Ft. Worth and Denver Railway Company, and Colorado and Southern Railway Company. On referring to the maps of Railroad land, Commission Exhibit 26A, 26B, 27, 28, 29, 30, 31, 32, 33, 34; Track No. 30 is Murray Yards, Commission Exhibit 28; as is Parcel No. 27, or tract No. 27, Commis-

sion Exhibit 28, being a land ownership map of the Railroad. The Witness stated that the Railroad ownership was outlined in one long dashed line and two dots, not necessarily as shown in red; and on further examination, stated that the Railroad claimed ownership to two parts shown in red as well as the parts within the two dotted lines. Witness Key stated (Tr. 686) that the maps indicated, in the judgment of the men who entered the records in the years from 1883 to 1966, the type deed as indicated in their judgment after reading the deed; that the warranty deed recorded in Book 692, Page 105, general warranty deeds, Recorder of Deeds' Office, Clay County, was a Holiday Inn site sold to Industrial Land & Airport property, Inc.; that the warranty deed shows August 16, 1960, $42,763.50, consisting of 5.031 acres; that in the South and East part of Murray Yards, near the turn-off going into the airport (Municipal Airport, Clay County, Missouri).

The Witness testified (Tr. 698) that the Railroad sold on October 19, 1960, to H. N. and A. W. Zimmer III, part of the northwest quarter of Section 24, Township 5. "That shows we gave the warranty to 10 acres, the price $80,000"; that on September 20, 1961, the Railroad sold 5.50 acres in Clay County for $46,750; that as a general statement of the three transactions checked for 1961, they averaged roughly $8,000 per acre; that Henry Wurst was sold 10 acres by the Railroad, for $100,000, by warranty deed that is indicated and that is in the Paseo District, (Clay County, Missouri); and in the same Paseo District, 1.16 acres for $11,600 to T. W. Mast, et al; on September 5, 1962, the Railroad sold to the Belger Warehouse Company (Tr. 699-670), "five acres by warranty, $50,000". The Witness agreed that the sales in 1962 were at the rate of $10,000 per acre and included putting streets, curbs, water and improvements to the property but included no buildings; that the ground sold in 1961—1962 had the curbs and streets installed when sold.

Witness Key stated (Tr. 701) that the street at the Holiday Inn site, previously testified to was already in and that it was not put in by the Railroad at the time of the sale.

With regard to 1963, the witness testified the Railroad sold in 1963, to Sears Roebuck & Company, out of the Paseo District, 39.117 acres for $327,127.95. The Witness testified that on August 7, 1963, the Railroad conveyed to City Investors, Inc. in the Paseo District, three acres for $36,000; that sales in 1963 were around $12,000 per acre; that in 1964 they were approximately $12,000 per acre; in 1965, approximately $14,000; in 1966, the average was approximately $15,000 per acre.

The Witness testified (Tr. 704) that there had been appreciation of value of land of the Railroad in North Kansas City, but that he had no record of what the Railroad had paid for the land; that efforts were being made by the Flour Mills of America to sell ten acres adjacent to the Murray Yard for $600,000; that on part of the land is a mill and an old milling house. He stated that the probable value (Tr. 708) of a 600 acre wheat field, known as Norman Beaman property, to be worth about 20¢ a foot, but that it could not be bought—it was not for sale; that the City wants considerably more than 20¢ a foot; that he thought it could be bought at about 50¢ a foot; that 50¢ a foot would be around twenty to twenty-five thousand dollars an acre. The Witness testified that the Railroad sold 233,616 square feet, at $175,212. (Tr. 212).

The Witness was referred to parcel marked No. 84 (Commission Exhibit 33) and stated it should be shown in red, and parcel No. 84 and No. 83 were sold from Adelaide south to approximately Prairie to Shell Oil Company. The Witness testified that in 1964 they sold two acres to Cummins Diesel Sales Corporation, by quit-claim and special warranty deed for $34,848; that this property is north of the Burlington Railroad roundhouse; that the Railroad

owns the land east thereof; it owns parcel No. 19; that said parcel is next to land sold for $17,000 an acre (Tr. 717).

Witness Key testified that the Railroad's 6.87 acre tract in St. Louis City, previously testified to, was transferred to Burlington Truck Lines cost on book—$8,256. (Tr. 718).

Witness Key testified (Tr. 720) that on October 7, 1960, the Railroad gave the City of St. Louis a quit-claim deed to approximately 15.975 acres, for $43,530; that this was in the dump area of the land previously testified to. The Witness stated he had the cost of this land in Chicago, but did not have it with him; that for $3,750 they bought roughly 95,000 square feet of land—"actually, these were clearance of title;" that 361,990 square feet, just under 9 acres, was quit-claimed to the City of St. Louis in 1961, for $129,716.23.

Mr. Reedy's cross examination was continued at (Tr. 724). He stated (Tr. 726) that there are 1,480 units of revenue equipment included in Account 58, made up of trailers, vans, containers, flatbed trailers, chassis, pole trailers, bogies, in which the investment is $8,602,220, original cost. (Tr. 727).

The Commission finds there has been no tax paid on this property in the State of Missouri.

Mr. Reedy was asked where the communication was reported in the State of Missouri for taxation and he stated it was reported at Question 16, Page 2, of Commission Form, which asks for miles of telephone and telegraph lines in Missouri, and the value per mile; and that this information had been filled in by the Railroad. He was then questioned as to where he received $283 value per mile as shown on the report. He stated he did not have any record of where he arrived at the $283 per mile. (Tr. 729).

Mr. Reedy's attention was called to Page 220, (ICC Report), where original cost of communications system was given as $29,560,000; and to Railroad's 1965 Annual Report, Page 22, Dispatcher-controlled wayside radios installed at nine locations between Quincy, Illinois and Kansas City. Witness stated this meant this went under the heading of "Communications"—and that it goes into telephone and telegraph. He was asked if he added anything to the value of this for these improvements and stated that the value per mile was adjusted for between the 1965 report and the 1966 report for communications system. He was referred to the 1965 report which shows $283 per mile; the 1966 report indicated $283 per mile. (Tr. 730-731).

Witness Reedy said the $283 figure did not come off of any book; that for the figure to be the same amount of dollars and cents each year, would be impossible. He stated (Tr. 732) he had never previously been asked to give information of this nature before the Commission, except last year, he was asked what the cost per mile was to build a railroad.

At (Tr. 734), Mr. Reedy was referred to Clay County Assessment on small tools, shop machinery and equipment. He stated that roadway small tools, Account 38, has an investment of $197,000 at the start of the year. He stated he could not furnish the details of that amount; (Tr. 735); that he had no knowledge of the amount in this account in Clay County, North Kansas City, Missouri, at the Murray Yards. He was then asked concerning an Account 44, Shop Machinery, and stated this would be car building, Diesel repair facility and coach shop; and that no shop of this type was operated in Missouri. (Tr. 736). The Witness was asked concerning the 584 cars that went into service in the year 1964 and stated he did not have a breakdown of the cost of these cars; that he just had a breakdown of the cars that went into service in 1965,

which was $25,776,816, on freight train cars. A comparable figure on the ICC Report is $30, 684,315. (Tr. 736).

Mr. Reedy said two items should be deducted from the $30,684,315 figure—six gallery cars, cab-controlled gallery cars used in suburban service in Illinois and 28 gallery cars used exclusively in suburban Illinois and the 12 locomotives. (Tr. 737). Mr. Reedy did not have the figures of foregoing equipment broken down.

Witness Reedy was next referred to warehouse and elevator in North Kansas City and/or Clay County, Missouri, which refers, on Page 230 B, to $700,000 investment. $1,400,000 is shown as the value of this elevator and Mr. Reedy was asked to explain the difference between these returns. He stated that the cost of rebuilding the elevator after the explosion and fire in the 1920's and various minor charges, have been capitalized over the years that have accrued, were not included.

In the Report to the Commission, he stated that a valuation was made by the Clay County Board of Equalization in 1963. He was asked why he did not report on Form 13-C the owner's original cost of land and buildings and he stated that "I have not included all of the items in the cost of structure." (Tr. 738).

The Commission finds that the Railroad did not follow the form in reporting the value of the grain elevator as prescribed by the State Tax Commission of Missouri.

Mr. Reedy was then questioned by Commissioner Davis and referred to Exhibit J (Tr. 740-751), which is the Railroad's petition to the Commission for this year stating that he signed it under oath and stating in part, "The Commission intentionally, or under such circumstances that it would not have resulted from an error in judgment, and under conditions resulting in constructive fraud as to this taxpayer for said year 1966, has failed to take into consideration all factors which relate to the value of

Protestant's said properties, and has given too much weight and consideration, to the exclusion of other relevant and important factors, to some factors relating to value." The Commission finds he did not have proper cause to make such a statement and that he did not explain what he meant by such a statement, alleging constructive fraud or that he was unable to state where constructive fraud existed.

Carl A. Norfleet was called by the Commission as a witness (Tr. 757) stating he was Supervisor of Taxes of the State Tax Commission of Missouri for the past two years and for the previous six years had been supervisor of Excise Taxes and previous to that Agent and Supervisor of Franchise Taxes; that he had computed public utilities distributable property taxes and in so doing, made computation and value of distributable property of railroads; that the market value of such property is not known and possibly never will be known as such a value could be definitely determined only through an actual sale between a willing and able buyer and a willing seller, not under compulsion to buy or sell, and sales of real property of the type and size of the roads operating in Missouri are extremely rare and practically non-existent, and, therefore, the Commission value is an estimate and any other value placed upon the property by anyone using any method they may devise is also an estimate; that no taxable value can be determined that is entirely factual and any appraisal for tax purposes is not an exact science; that the responsibility of the Commission in regard to the assessing of a factual value of such property lies mainly in two areas: One, that the method of assessment as employed should not be discriminatory as compared to assessments of like property. Two, that the valuation determined by the Commission must be a reasonable one; and that this is the policy of the Commission followed by the Witness in making the tax assessment of the distributable property of all railroads in Missouri. This procedure is set out at

(Tr. 739-760) and the Commission finds that they correctly stated the procedure determined by the Commission in the assessment of all Railroad property; that the final assessment is made by the Commission after Mr. Norfleet has applied the Commission's method to the property of the Railroad.

Mr. Norfleet referred to Commission Exhibits 15 and 16, stating the valuation on Exhibit 16, was taken from reports of the previous year without adjustment. The valuations on Exhibit 15 were made upon those records but show a reduction in value. The Witness stated (Tr. 761-762) that Exhibit 15 is the one used in the determination of the valuation of $331,429,784, it being for the Railroad's distributable property for 1966, the subject of this hearing. Mr. Norfleet stated that an acreage value was taken from the records showing the valuation of $60 per acre that had been used in 1964 and 1965; that this was present in the records but he did not know exactly how such value was determined; that it was used with regard to value of buildings and other fixed property which were reported by the Railroad to have a value of $294,859; that it had been reported as original cost. To this figure some adjustments were made and were caused by the addition of the values which had been reduced by the Railroad and restored by the Commission, in processing the report, resulting in the figure of $299,913, which was trended upward by the Commission, using the percentage figure of 226.566, which resulted in a taxable value of $[illegible] for the buildings and other fixed property and right-of-way in Missouri. He stated he had no doubt that original cost as reported in the buildings and other fixed property on the right-of-way, is not correctly shown; that in studying this year's report and reports of past years, the amount brought forward is shown on the face of some of the Railroad's reports under Original Cost, in the 1966 report, is a total of the amounts reported by the counties on Form 2 and under the heading there on that form of value, on the various county sheets

it is noted that certain pieces of property have been reduced from year to year. The *original* cost of a turntable in 1962 was shown to be $15,000. In 1966, as $8,180. The Depot at Liberty, Missouri was reported in 1962 to have a value of $3,833, in 1966 it was included in the *original* cost amount at $1,065; that buildings and other fixed property on right-of-way on a mileage percentage was computed to be less than 1 percent of the apportioned value of buildings and other fixed property to Missouri by allocation method.

At (Tr. 764), Mr. Norfleet stated a reduction in main line value in 1966 from $22,665 per mile to $20,000 per mile; that the reduction was made on the main line valuation at the request of Mr. James P. Reedy.

Mr. Norfleet was asked to explain Exhibits 17, 18, 19, and 20 and how he used them in his calculations, stating Exhibit 17 is a breakdown in valuation of each type of track of all railroads in Missouri and offered for the purpose of showing no discrimination against the Railroad on the basis of line values; Exhibit 18 is an extract from the Commission records showing exact value used on each type of line in the past five years. It was not used in this year's calculation, except for the 1966 figures, and it shows that the main line value has been reduced beginning in 1962 with a value of $23,863 per mile. (Tr. 766), that in 1965, it was $20,000 per mile; that it shows a slight raise in second main line, and a reduction in branch line in 1965 and 1966; and that it shows the value of side track as remaining constant throughout the years. Exhibit 19 is an extract from the Commission records of the valuation per acre of right-of-way used in making the 1966 assessments on the railroads shown. It is used purely for information to show the value used in the original calculation of the Railroad was consistent with the value of other railroads. The Burlington Railroad value is $60 per acre; the main line of first class railroads are about the same.

The Witness, in explanation of Exhibit 20, stated it was the average value of the distributable property per mile in Missouri and shows number of miles main and branch lines of each railroad operated in Missouri; that it shows the Missouri distributable property value as determined by the Commission and it breaks down on an average per mile. The Exhibit includes all distributable property which includes rolling stock, buildings, fixed property, on the right-of-way. The purpose of this Exhibit was stated to be that no discrimination in determining assessed value was exercised on the Burlington Railroad.

Mr. Norfleet stated that the average distributable property per mile as shown in Exhibit 20, is $31,238; that the average of the Burlington Railroad is $26,035 and the valuation of the other roads are as shown from a low of the Missouri-Kansas-Texas of $17,718, to a high for the Santa Fe, of $51,311, and the Norfolk & Western, of $55,052. Mr. Norfleet stated that on Page 543, of the 1966 Transportation Manual published by Moody's Investors Service, Inc., it shows that in 1952, the Burlington Railroad issued bonds in the amount of $25,000,000. Under the heading showing the purpose of this issue is this notation, that $12,460,100 be used to retire some outstanding obligations at that time, and that the remainder be used according to the wording of the purpose for acquisition and construction of new line between Missouri City Junction and Needles Junction, Missouri, leaving in excess of $12,500,000 available for the construction of this new main line track, of 74 miles; and that based on this information, the minimum cost of this line at that time would have been $169,918 per mile.

When asked concerning available knowledge of any other construction of new railroads in Missouri, the Witness stated the Annual Report of the St. Louis & San Francisco Railroad, as of December 31, 1965, states they were building 32.7 miles of new line in the recently owned mineral

development in Crawford and Iron Counties, Missouri; and that this track would cost $6,500,000, or an average construction cost per mile of $198,776, which would be classified as branch line as it is merely an extension of an existing branch line of this railroad into that area.

Mr. Norfleet was asked as to computation in valuing the rolling stock of the Railroad and stated that the Railroad reported the number of units of rolling stock, the type, age and the original cost of these units; and that the Commission allowed depreciation of rolling stock of the Railroad and all railroads at the rate of 5 percent per year until a base of 25 percent of original cost is reached, which is not reduced further as long as such items remain in service, except that this depreciated cost is then equalized at 47 percent, which means 47 percent of 25 percent on the original cost after fifteen years, or an ultimate valuation of 11.75 of original cost on such property.

The further procedure was that the depreciated original cost of the Railroad was $205,440,024, and to this was added the value of leased rolling stock in use by the Railroad totaling $209,911, or a total of $205,649,935, which was then equalized at 47 percent, causing an equalized value for the purpose of taxation of $96,665,469 on rolling stock.

The Railroad has 8,545.12 miles of track everywhere; in Missouri, 1,283.61 miles; the Missouri miles being 15.021 of all the Railroad's miles. This 15.021 was applied to $96,665,469 rolling stock valuation, thus making the Missouri allocated portion of the rolling stock $14,518,618. To this total was added $8,337 representing Missouri's portion of the value of 37 leased cars valued by the Commission at $1,500 each, which were shown in the ICC Report of the Railroad but were not shown in their report to the State Tax Commission of Missouri, making the total value of rolling stock of the Railroad for 1966, $14,526,955.

The value of roadbed previously testified to, is $19,350,233. To this is added the fixed property on the

Railroad right-of-way, $906,067, rolling stock $14,526,955; from this amount an economic obsolescence deduction was made by the Commission of $1,353,384, resulting in a total taxable value for 1966 on distributable property of the Railroad within the State of Missouri for the purposes of taxation of $33,429,871.

Mr. Norfleet stated that the economic obsolescence adjustment used in 1966 was calculated by considering the Railroad's total investment in transportation property, $1,023,057,867, comparing this with its net railway operating income, all for 1965, from the report submitted in 1966. The 1966 report of the Railroad to the State Tax Commission is accompanied by the Form A, or ICC report for the previous year ending December 31, 1965. (Tr. 775.)

Mr. Norfleet testified that with its net railway operating income in the amount of $20,423,802 and then subtracting the resulting percentage of 1.99 from a desired potential income yield of 10 percent, this developed an economic obsolescence percentage of 8.01 per cent and resulted in the deduction or economic obsolescence of $2,913,281.

The assessment of the Railroad for 1966 was first set by the Commission at $34,817,172, which was reduced by the foregoing calculations to $33,429,871; even though the rolling stock of the Railroad had increased considerably in the year 1966 over the year 1965. The same pattern and formula was followed in the development of computations of all of the railroads in the State of Missouri. (Tr. 776).

Mr. Norfleet was asked what he had done in regard to developing valuations since July 8, 1966, when the matter was sent to the Commission on remand for further hearing by the Circuit Court of Cole County, Missouri, and he stated he had been checking the value of the acreage of the right-of-way of the Railroad, and that he had found

from information in the Recorder's Office in Clay County, Missouri, the following transactions: 1. Exhibit 36, (Tr. 777-782, inclusive) sale of 39.177 acres to Sears Roebuck and Company, February 11, 1963; consideration $327,127.95.

Item No. 2: Sale date January 5, 1962, from Burlington Railroad to National Bellas Hess, 13 acres; consideration $110,500.

Item No. 3: Sale date September 26, 1962, to Printing Park Corporation, 10 acres; consideration $100,000.

Item No. 4: Sale date, May 29, 1962, consideration $950,000. The Commission finds that this sale included some improvements and is not for land alone.

Item No. 5: Sale date July 9, 1965, to the City Investors, Inc., 3.94 acres; consideration $55,500.

Item No. 6: Sale date, August 7, 1963, to City Investors, Inc., 3 acres; consideration $36,000.

Item No. 7: Sale date August 10, 1966, to John W. and Larry B. Belger, 3.96 acres; consideration $59,160.

Item No. 8: Sale date June 8, 1966, to Stephenson Yost Steel Company, 4 acres, plus fraction; consideration $60,000.

Item No. 9: Sale date January 4, 1966, to Weyerhauser, Inc., 4 acres, plus fraction; consideration $60,380.

Item No. 10: Sale date December 30, 1965, 5 acres; consideration $70,000.

Item No. 11: Sale date March 11, 1954, from B. Fleming Company to Equitable Life Insurance Company, 8 acres; consideration $60,000.

Item 12: Sale date August 1, 1957, Clorox Company, 2½ acres; consideration $26,000.

Item No. 13: Sale date June 12, 1959, to H. J. Cole Company, 1.83 acres; consideration $60,000.

The Commission finds that all of these properties border on or are adjacent to the right-of-way and are served by the Chicago, Burlington & Quincy Railroad. Witness stated he had knowledge of comparable railroad property in Missouri, that being Terminal Railroad Association in St. Louis and the Kansas City Terminal Railroad Company in Kansas City, Missouri. He was asked whether he had knowledge of any comparable property to the Murray Yards of the Burlington Railroad property and he stated that the St. Louis Terminal Railroad Association and the Kansas City Terminal Railway Company were not comparable; that while they had large assemblages of switch tracks and various railroad tracks, there was a difference in that the Murray Yards is operated in direct conjunction with a large industrial area to which this Railroad (Burlington) has an exclusive or a monopolistic entry and right to do business through the control of the access to the industrial area surrounding it.

The Witness stated (Tr. 784) that he had been in, and examined, and was familiar with the Murray Yard, St. Louis Terminal and the Kansas City Terminal yards and to his knowledge they were the three largest in the State of Missouri; that they have main lines as well as side tracks and second main lines and in his opinion, the North Kansas City Yards of the Railroad, is the most valuable not only because of the value of the land itself, but also by comparison of sales; and it also has another large value in that where this yard lies in itself almost creates a monopoly of doing business within that large industrial district.

Witness Norfleet testified the Burlington bridge at the North Kansas City yards and the ASB Bridge (Armour, Swift, Burlington) are the only accesses between Kansas City, Missouri and North Kansas City, Clay County, Missouri, for rail purposes. The Wabash has a main line through this area but uses the Burlington bridge and has

no access to the industrial district; merely passes through the area. The Burlington also has its main line running through the district in addition to its second main switch, branch and side lines, previously testified to, in this district.

At (Tr. 786) Mr. Norfleet was referred to Exhibits 27, 28, and 29, which are maps of the Murray Yards furnished by the Railroad, and stated the valuation of the right-of-way of the Kansas City Terminal Railway consisted of 258 acres on which the Commission placed a value of $3,080 per acre; that the right-of-way of Terminal Association of St. Louis consists of 480.58 acres, valued at $3,080 per acre; that the valuation on the Murray Yards property identified on Exhibits 27, 28, and 29, had been valued in 1962, 1963 and 1964 at $55.00 per acre; and in 1965 and 1966 it was valued at $60.00 per acre. (A correction was made that the Exhibits are 28, 29 and 30 rather than 27, 28 and 29, and was agreed that the testimony was pertinent to Exhibits 28, 29 and 30.) (Tr. 787).

Witness Norfleet stated that the land, lead track and right-of-way in the North Kansas City Railroad Yards is almost always owned by the Burlington Railroad, except for a line of the Wabash which leads through there, with limited access; that the value of the North Kansas City Railway land is in excess of the value of the St. Louis Terminal and Kansas City Terminal right-of-way. (Tr. 789).

The Railroad did not file with the Commission a report of any of its so called "piggyback" equipment or leased piggyback equipment. The ICC Report submitted by the Railroad, on Page 316, shows 350 semi-trailers purchased by the Railroad cost $2,323,550 an average of $6,638 per unit; and also shows the purchase of 100 refrigerator trailers for a total amount of $1,142,300 or an average per unit of $11,423. The Burlington Truck Lines., Inc., has

not filed a return for advalorem tax purposes with the Commission.

Rolling stock of the Railroad, fifteen or more years old, is assessed as low as 11.75 percent of original cost. (Tr. 790) 60.72 percent of the total number of rolling stock units of the Railroad were assessed by the Commission at 11.75 percent of original cost, or a total of 27,646 units. There are 921 units, including cars and locomotives, in the 14.10 percent bracket; 3,079 units in the 16.45 percent bracket; 350 units in the 18.80 percent bracket; 856 units in the 21.15 percent bracket; 847 units in the 23.5 percent bracket; the total number of units reported to the Commission being 33,669 units. 74.01 percent of the total reported rolling stock of the Railroad, 45,530, was valued for tax purposes by the Commission at less than 24 percent of original cost. (Tr. 791).

No appreciation was added to value by the Railroad for tax purposes for rebuilt rolling stock or for repair and rebuilding of locomotives.

The equipment of all other utilities assessed by the Commission is at original cost or higher and then equalized at 34 percent. No depreciation is allowed and it is not valued for assessment at less than 34 percent of the original cost. (Tr. 792).

Mr. Norfleet was asked to explain Exhibit 21, which reflects a selection by the Witness from the Railroad's own Exhibits, samples and approaches to values used by the Railroad. From those Exhibits, the Witness combined them all in equal proportion to produce the figure which would substantiate the previous assessment. The Witness stated that by a sampling of the Burlington Railroad's exhibits to show that by using capitalized income, stock and debt, and a cost factor, the Commission could have come up with a factor equal to, or in excess of, the one arrived at by its use in actually making the assessment of the Rail-

road for 1966, of its distributable property for the purposes of taxation.

Commission Exhibit 22, based on Railroad's Exhibits T, X, U, W, and MM, and are explained by Witness Norfleet. (Tr. 794-795). Exhibit 23 is explained by the Witness, (Tr. 796) as showing the total mileage operated in each state, taken from Page 401, ICC Report of Chicago, Burlington & Quincy Railroad Company, dated December 31, 1965.

The second column on this exhibit is taken from the Railroad's Exhibit P, showing amount of taxes paid for the year 1965 in each state.

The third column is a division of amount of tax paid by the number of miles operated, to show the average tax dollars paid per mile of main and branch line operated in each state.

The Commission finds that if the reduction in assessment was granted as requested by the Railroad, the tax per mile in the State of Missouri for the Railroad, would be $533.76. The Missouri tax per mile operated is $1,034; in other states in which the Railroad operates are from a low in Kansas, of $361 per mile; to a high in Illinois of $1,833 per mile, and Wisconsin of $1,964 per mile.

Witness Norfleet was asked to compute what the tax per mile would be for the Railroad, if given the relief requested in the Circuit Court of Cole County, and stated the tax per mile in the State of Missouri would be $533.76. (Tr. 797).

The Witness was handed Commission Exhibit 24, which shows the percentage total tax paid by the Railroad, by state, compared with the percentage of main and branch line operated in each state. The taxes paid were taken from the Railroad's Exhibit P. The percentage of railroad system operation, by state, was determined from the main and branch line operated, Page 401, ICC Report,

Chicago, Burlington & Quincy Railroad, as of December 31, 1965.

The Railroad paid 14.41 percent of taxes in Missouri and the percentage of the Railroad's system operation in the State of Missouri is 15.02 percent, that being the percent of the Railroad's Missouri trackage compared with its total trackage everywhere located within the State of Missouri. The comparable figures per State are as follows:

	Percentage of System Operated	Percentage of Taxes Paid
Colorado	4.35	5.04
Illinois	19.15	29.69
Iowa	11.70	13.99
Kansas	2.55	.78 of one percent
Montana	2.15	1.45
Nebraska	30.94	22.31
South Dakota	2.15	.75
Wisconsin	2.58	4.29
Wyoming	8.30	7.92

Mr. Norfleet was handed Exhibit 25 and testified therefrom (Tr. 802-803) and the Commission finds, as he stated, that the assessed value and the tax rate must be considered together to be significant and to arrive at the amount of money paid in taxes upon property; that column 5 of the Exhibit is based upon a $100 unit of valuation; that an assessed value might be high, and the rate low, or the rate high and the assessed value low and in each instance the tax dollars paid on the same property would be equal.

Mr. Norfleet's calculations were taken from figures from the Railroad's Exhibits, without element of judgment. (Tr. 804). The assessed valuation is divided by the number of miles in the State involved. Column V is the tax levy per hundred dollar unit of valuation. Column VI, is the taxes paid per mile in the states shown in the Ex-

hibit and the state taxes per mile as shown on the Exhibit are as follows:

Missouri	$1,057	Montana	$ 782
Colorado	906	Nebraska	831
Illinois	1,780	South Dakota	406
Iowa	1,316	Wisconsin	1,938
Kansas	362	Wyoming	1,125

Witness stated in Kansas, the Railroad does not have any main line; in Wisconsin all Burlington line is main line; in Missouri, the main and branch lines are approximately fifty percent. As shown in the lower right hand corner of this Exhibit, all Missouri system produces a very minor difference from the unit valuation system as applied over these other Burlington states when the tax levy is considered, as well as the valuation. (Tr. 808) According to Mr. Norfleet's calculation, the average tax per mile main and branch line operated in the states using unit valuation was $1,050 per mile and the comparable figure for Missouri was $1,057 per mile.

Mr. Norfleet was referred to Railroad's Exhibit T through X and also MM, and stated these exhibits dealt with theoretical approaches to value that are usually used in conjunction with the unit system of valuation; and that they are not in conformity with the accepted theory pertaining to such approaches to value; that stock and debt approach would not be applicable, as 97 percent of the Railroad's stock being closely held by two other companies is not on the market and stock sales of 2,000 shares out of 1,708,391 shares of outstanding stock, loses any semblance of true market valuation and is, therefore, not clearly applicable.

The Witness referred further to a statement of Mr. Broley Travis, who had appeared in this hearing as an expert witness for the Railroad and in his report to the Colorado Legislative Council recommended on Page 22,

the stock and debt method be used in valuation, and he rejected this approach when he stated that occasional sales over the counter were not reliable and should not be used in this approach to value. (Tr. 840).

Witness Northey stated his description correctly fits the stock sales of the Railroad and that another element missing in the Railroad's stock sale is the absence of any elements of control which is considered to be an important factor in stock and debt valuation; that the purchase of stock "should enable the buyer" to contemplate he might assert some value in the direction and control of the company involved. (Tr. 811).

The Witness stated he had examined various exhibits of the Railroad that dealt with capitalized income approach to value and that any corporation which is under complete control of two other companies in the same business, and whose operations as a stock, is always suspect, for the purpose of capitalization income approach to value, as is the Railroad which is controlled 97 percent by the Great Northern and Northern Pacific Railroads, and the net income of the Railroad is of secondary importance to its principal owners, particularly where it insures the owners access to major railroad centers.

The Railroad's Exhibit V (Tr. 813) based on the Railroad's own figures, reflects the reproduction cost of their plant in Missouri less their own depreciation, less their own percentage of obsolescence, is $115,022,219, which equalized at 34 percent as used by the Commission in assessment of other utilities and railroads, would produce a taxable value in Missouri for the Railroad of $39,170,554; or if equalized at thirty percent, would produce $34,506,665. (Tr. 814). Exhibit V projects obsolescence into the calculation therein twice, and understates the value that should be established by proper use of the income approach.

Mr. Northcott was referred to Railroad's Exhibit A, Page 37, under "Mechanics of the Stock and Debt Method" which states, "perhaps it is needless to emphasize at the outset that the stock and debt approach finds its essential justification in the fact that shares of stock and units of long-term indebtedness of the larger carrier and other utility corporations are common objects of exchange in the leading financial centers." (Tr. 815)

The latter part of the Railroad's Exhibit A has several schedules and tables entitled "Appendix E" and Page 105 shows combinations of the capitalized earnings of stock and debt approaches to value. Therein were considered thirty-six railroads by the committee making this report on unit valuation to which the capitalized earnings stock and debt approaches were applicable.

The listings therein of railroads to which this system is considered applicable, does not include the Chicago, Burlington and Quincy Railroad. (Tr. 816).

The Commission conceded the $950,000 for 10 acres of land sold to Carpenters Paper Company, shown as Item No. 4, second page of Exhibit 36, was an error, that it should have been $95,000. (Tr. 823).

Witness Northcott, again testified (Tr. 827) that the depreciated value of rolling stock is taken down to 25 percent at the rate of 3 percent per year for 15 years; and that of said depreciated value, 47 percent is taken as the assessed value after taking the Railroad's percentage of such property in Missouri, which is 15.02 percent.

Mr. Northcott testified that the 47 percent (the equalized factor previously referred to) is the reduction factor to reduce the value of this class of railroad property to the level of 30 percent of value, which the Commission wants to achieve in assessments; that the 47 percent is applied to the further reduction of the depreciated value which

has been depreciated down as low as 25 percent in the case of 15-year old equipment.

Mr. Norfleet testified (Tr. 832), on cross examination by Mr. Street, that on other utilities, 34 percent of original cost was used which was then trended to bring it up to the present day cost of reproduction; thereafter, a depreciation factor was used and after finding depreciation factor of trended cost, it was then equalized at 34 percent; and that, in his opinion, it resulted in the final figure of 30 percent. Mr. Norfleet at that time was asked to obtain the formula used by the Commission upon electric power and light companies in assessing them on their distributable property and stated that a trending factor of 1.35598 was applied to the original cost of distributable property and then a percentage condition of 77 percent was applied and equalization rate thereof of 34 was applied, which actually produced an assessment that, based on the original cost of this power and light company, was 35 percent of original cost of distributable property.

Mr. Norfleet stated that in his opinion, this brought the assessment down to 30 percent of value and that a formula had been used to make railroads assessed at 30 percent; (Tr. 834); that being the objective of the Commission.

On cross examination, Mr. Norfleet explained how pipe line property is assessed by the Commission, stating that the equipment other than the line, the pump equipment, all of the things that go to make up the complete operation, are assessed by the Commission at 34 percent of original cost; that the pipe originally is valued at $1,000 per inch, per mile, or a mile of 10" pipe would be valued at $10,000; or a 30" pipe would be valued at $30,000 per mile; that depreciation thereon is allowed down to the level of 50 percent, at the rate of two percent per year, which is the minimum value of the pipe line formula. He was asked what percentage that resulted in and stated in the area of 30 percent assessment, which is the objective of the

Commission. All equipment other than the line itself, whether it is pumping equipment or metering equipment, or buildings or whatever, is on the pipe line right-of-way and state assessed, by the Commission, at 34 percent of full original cost. (Tr. 837).

Mr. Reedy was called to the stand and identified Exhibit XX, stating it was a tabulation of sales of abandoned right-of-way in the area of Cameron Junction to Kearney. This was the former main line into the City of Kansas City, across the State of Missouri, and was superceded by the Centennial Cutoff which goes from Brookfield diagonally into Kansas City; that through 1965-66, the Railroad disposed of 218 acres of abandoned right-of-way for total consideration of $12,271, or $56.28 per acre, and that it was disposed of through quit-claim deeds.

Mr. Street stated (Tr. 839) that the Railroad reserved the mineral rights as a company policy; and he further stated that during the same period of time, 1965-66, an additional 40.85 acres of the abandoned right-of-way, Green City to Milan, were sold for a total consideration of $851, or $20.83 per acre.

The Commission finds that Mr. Reedy's testimony that the foregoing property has been sold, is not worthy of belief. The Commission finds the Railroad executed quit-claim deeds without warranty and reserved any mineral rights to itself and that the consideration as stated by the Witness is not the total consideration, nor a correct description of the conveyance and his testimony is not worthy of belief, nor is Exhibit XX. (Tr. 839, 840, 841).

Witness Reedy testified that on November 22, 1965, the Railroad sold a 8.73-acre tract adjacent to the socalled Centennial Cutoff (Brookfield to Kansas City); that the excess right-of-way that was purchased was sold by quit-claim deed for $750; that this was in Carroll County, Missouri.

Mr. Reedy stated the correct sale price for the Carpenter Paper Company real estate sale in 1962, Item No. 4, Exhibit 36, for 10 acres, was $95,000. (Tr. 842).

Mr. Reedy testified that the total value of rail and ties on hand as of January 1, 1966, was approximately $22,000; and that they had been turned in for taxation at approximately $2,203, (Tr. 844); that with regard to road materials and supplies in North Kansas City, there were no ties included; that the second-hand rail on hand was reported by the taxpayer's valuation at $215; that $2,130 is the book value of this rail from the Railroad's records; (Tr. 834); that a value of $14,660 in North Kansas City was reported; that miscellaneous items reported at a total of $90,371 is the book value carried by the Railroad in the State and the reported value was $22,605; that $58,648 of inventory was in North Kansas City; that the furniture and fixtures of major structures, the depots and such, the investment in these furniture and fixture items have been drawn out by the Railroad's Valuation Engineers and shown separately from the building.

The Witness testified (Tr. 846) that in terms of the Kansas City freight house, there was a total of $660,000 invested in that property and included in the Railroad's records was the value of the items of personal property; and that, right or wrong, they were still included in that figure; that approximately $117,000 of those items of personal property were included; that they consisted of the system of transferring the freight from one loading dock to another, the dock carts, and the machinery and equipment that was tied in with that totaled up to a greater share of this $117,000. Something like $90,000, and other items included in that were the value of the typewriters and fixtures, desks, billing machines, things of that nature; that the report of the $117,000 personal property is part of $660,000 building also inadvertently reported. The Witness stated he did not bring the cost of building with him

but that it would be right at $660,000. (Tr. 847). He further stated investment shown into the State of Missouri as original cost of all stations to be $273,920.

The Witness stated (Tr. 848) that the Kansas City Freight Depot was built in 1961 at an original cost of $666,397, the depreciated cost was $664,021; and that he returned $95,000 as the value of that freight depot, knowing that there would be a $223,000 assessment placed upon it utilizing the "historical 226 point multiplier". He then was asked, "The original cost you turned in of the $273,220?" Answer, "Yes". Witness then stated that the Railroad's investment in building Accounts 16 and 17, totaled $4,231,000, that being original cost. (Tr. 849).

Mr. Reedy was asked (Tr. 854) if he could give the amount of the Railroad's original investment in land and buildings in the State of Missouri, including furniture and fixtures carried therein by the Railroad's accounting system. He stated (Tr. 855) that investment in building is $4,231,780; investment in outside facilities is $1,368,094. There was a contents figure of $783,670, which was the furniture and fixtures account.

Mr. Reedy agreed at (Tr. 856) that the figures the Railroad turned in to the State of Missouri for locally assessed land and buildings amounted to $1,922,048; that furniture and fixture account turned in was for a value of $18,955; and he also agreed that leaves the original investment of building accounts in Missouri, exclusive of land, $3,658,871; and this amount was turned in to the Commission in the amount of $384,859, and the Commission raised this to $906,067.

Mr. Reedy was asked (Tr. 857) about the local returns he compiled for the Burlington Transportation Company and returned on trucks a value of $700 for tax purposes, and stated that the investment the Burlington Truck Lines had in this type of truck was $8,616.58, that being original

cost without depreciation; that these trucks were 1965 models; that there were ten of them and that he turned in trucks, one year old, that cost $8,616 each, at $700 each. (Tr. 857).

Mr. Reedy stated (Tr. 858) he turned in at between 10 and 11 percent, materials and supplies to local assessors.

He was asked about 8.73 acres sold and located in Carroll County and previously testified to, and he stated he did not know if there were any reversionary clauses involved in this property; that he had no particular knowledge about this eight acre tract.

Carl A. Norfleet was re-called as Witness by the Commission (Tr. 861) and was asked if he had prepared a new worksheet of taxation for 1966 distributable property of the Chicago, Burlington & Quincy Railroad to submit to the Commission. He stated he had and that it had been marked Exhibit 37-A, consisting of three pages. The gross valuation shown is not the same as on the previous worksheet and that it had been prepared for submission and recommendation to the Commission; that the amount of increases and reasons therefor, and the computations thereon, show how they are arrived at; and that this worksheet deals with additional values developed in this hearing of omitted property and under-assessed property. (Tr. 862).

The increase in the value of the acreage in North Kansas City Yards of the Railroad is based on 224.47 acres of land and on recalculating it, is put in at a value of $3,020 per acre. It was originally valued at $60 an acre, and is in the original computation at $60 an acre. This is an additional value to that $60, giving a total value of acreage in the North Kansas City Yards of the Railroad of $677,899 additional. The total value would be that, plus $60 an acre.

The next item is the additional value of the acreage in the St. Louis City Yards of the Railroad, which consists

of 107.67 acres, which is valued on this sheet at $3,020 per acre, which is in addition to the $60 included in our original valuation of distributable property, the additional amount being $325,163.

The next item is 12 Diesel locomotives leased and in service, brought out in the hearing. The original cost was furnished by Mr. Reedy and put in at 95 percent of condition, with a reduction factor of 47 percent, and the Missouri rolling stock mileage applied. This item increases the distributable property value in Missouri by $197,774. The cost figure was $2,948,832, previously testified to.

The next item is entitled "Revenue Equipment", which is carried under railroad Account No. 58, commonly referred to as piggyback equipment in the ICC Report and referred to in previous testimony. The Witness had determined depreciated value of this equipment of $4,871,788, which, times the Missouri rolling stock percentage, 15.02 percent, gives an additional value in this category of $731,-791. (Tr. 864).

Revenue equipment was reported under Miscellaneous Equipment. It was not identified as such, as piggyback or trailer and truck equipment, and no tax had heretofore been computed on those items. Additional value on revenue equipment, just identified as ICC Account No. 58, is $731,-791. The Witness stated that the total of value of omitted equipment and the adjusted values on under-assessed property is $1,932,627. To this, he then applied the economic obsolescence percentage which was applied to all the property in the prior valuation, obsolescence factor being 8.01 percent, causing a reduction of $154,803 and reducing the value to $1,777,824. This, plus the valuation established previously, gives a 1966 valuation of the distributable property of the Railroad in Missouri of $35,207,695.

Mr. Norfleet recommended that assessment to the Commission (Tr. 866). He was asked to proceed with his ex-

planation of Exhibit 37-C, which shows the computation of the value of revenue equipment entitled "Miscellaneous Equipment". He had obtained the figures from Mr. Reedy the day previous and had taken the original investment in this equipment and depreciated it at the rate of 10 percent per year, beginning with 1965. Following this process, he arrived at a net depreciated value of this equipment of $4,871,788, and that, times the Missouri rolling stock percentage, gives the figure of $731,791 as tax value.

Mr. Norfleet was handed Commission's Exhibit 38 and testified it was photostatic copy of the records in the office of the St. Louis City Assessor, of City Block 238; that the Assessor has a card for each city block as an original record; that City Block 238 shows assessed value of this property, per acre, in 1966, 1965, 1964 and 1963, was $24,765; that value having been established in 1962.

Exhibit 39, is City Block 3470, per acre assessment is $1,580 and improvement assessment thereon is $3,350, first made in 1960 and has not been changed. (Tr. 870). The next assessment shown, per acre $5,400; the next $3,530; the next $1,530, the next $1,500; the next $1,530. This proprety is along the bank of the Mississippi River and adjacent to wharves thereon and along the high water level mark thereon of the river. The letters "S T C" mean State Tax Commission and said tracts therein are shown to be property of the Railroad. (Tr. 872).

Mr. Norfleet was referred to Exhibit 40, which referred to City Block 3334, owned by the Railroad and is locally assessed at $3,500 per acre.

Exhibit 41 refers to City Block 3327. It, likewise, is owned mostly by the Railroad and is being assessed locally at $2,667 per acre.

Exhibit 42 refers to City Block 3470, mostly owned by the Railroad, one tract therein owned by the St. Louis Grain Company, and land in this City Block 3470 is assessed at

$2,330 per acre. Ground adjacent to this block is being assessed by the Commission and was originally assessed at $60 per acre and the same tract, 3280.

Exhibit 43 refers to City Block 241, owned by the Railroad and is locally assessed except for an acre on the East side which is assessed by the Commission. The local assessor placed an assessment of $13,200 per acre. The Commission assessed it at $60 per acre.

Exhibit 44 refers to City Block 3470, the owner is Shell Oil Company, and Chicago, Burlington & Quincy Railroad. Local assessment thereon is $3,370 in one area; $5,860 in another area; $5,860 in another area. (Tr. 876).

The Witness stated he had been present during the testimony of the Real Estate Agent for the Railroad, who testified in regard to the location of the property sold by the Shell Oil Company and remembered part of the testimony pertaining to the fact it was dump and is now being assessed at $5,860.

Exhibit 45 refers to City Block, entirely owned by the Railroad and assessed locally at $3,500 per acre.

Exhibit 46 refers to City Block 3328 owned partly by the Railroad and partly by the Metropolitan St. Louis Sewer District. The assessed value by the City Assessor in this block is $2,776.

Exhibit 39 refers to City Block 3470 and shows the City of St. Louis owns one parcel; the remainder is owned by the Railroad. The local assessor placed an assessed value on the land next to the river of $1,500 per acre and the land adjoining this to the west at $5,400 per acre, and in another area at $1,530 per acre.

Exhibit 47 was withdrawn by the Commission. (Tr. 878).

On cross examination, Mr. Norfleet was referred to Exhibit 37, land in the North Kansas City yards, having 232.47

acres, referred to as the Murray Yards, being a railroad freight yard occupied mainly by railroad tracks, switches and other appurtenant facilities connected with the Railroad.

Mr. Norfleet stated (Tr. 881) he did not know whether or not the land referred to in Exhibits 39-46 was laid off in streets and had improvements, such as sewers, etc. He was not physically familiar with the property.

The State Tax Commission of Missouri has adopted uniform procedures and methods to determine the true value in money of the railroad property for assessment purposes within the State of Missouri. Such procedures and methods are designed to value all railroad property within the State of Missouri uniformly and equally with all other property within the State of Missouri. Such procedure and methods were used in assessing and valuing the petitioner's property as of January 1, 1966. The evidence failed to disclose that the property of the Railroad was ever placed on sale in the open market.

Valuations are made by the State Tax Commission as to the distributable property and rolling stock of railroads while other properties are assessed locally by county and township assessors. The relative values of sales ratio assessment and utility assessment are separate and distinct in that there are two methods used in arriving at values, and there is no basis for comparison between the valuation of the sale of a farm or a home based on revenue stamps attached to the deed and the valuation of utility property which is not being sold frequently, or ever. There is no similarity in these two types of property or in the method of arriving at the valuations for assessing purposes thereof.

Conclusions of Law

All railroads now constructed, in the course of construction, or which shall hereafter be constructed in this State and all property, tangible personal property, and intangible

personal property owned, hired, or leased by any railroad company or corporation in this State shall be subject to taxation, and taxes assessed on real property, and tangible personal property shall be assessed in the manner set forth in Chapter 151, R. S. Mo.

Property shall be assessed for tax purposes at its true value in money or such percentage of its true value in money as may be fixed by law. There is no such thing as an absolute true value of property. The values mentioned in the Statutes are the valuations of officials whose duty it is to make them. Property, including railroad property, is not a commodity which has fixed market value at a given period. The value is determined always by the estimate of the party who values it; all presumptions will favor the correctness of the valuations of the officials whose duty it is to make them; and their good faith and the validity of their acts is presumed. The State Tax Commission of Missouri is the sole judge of the credibility of witnesses appearing before it.

The testimony of James P. Reedy and Broley E. Travis is not credible and is not worthy of belief.

Every owner, lessor or party having an interest in property shall have the right to appeal and to a rehearing under rules prescribed by the State Tax Commission. The said Commission shall investigate all such appeals or motions for rehearing or protests of assessments and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious.

In assessing, adjusting and equalizing a railroad property for any year or years, the State Tax Commission may arrive at its finding, conclusion and judgment, upon its knowledge, or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the Commission may think it

is entitled to; provided, that when any railroad shall extend beyond the limits of this State and into another state in which a tax is levied and paid on the rolling stock of such road, then the said Commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company.

In determining the total length of the road of railroad company for the purpose of determining its tax assessment, the Commission is required to take into consideration the track which is operated partially under the control of the railroad under trackage agreements as well as that which is owned by the railroad, even though such trackage agreement does not provide for the exclusive use by the railroad of the track in order to require it to be taken into consideration.

The assessment of the rolling stock of the Petitioner was determined in accordance with Chapter 151, R. S. Mo., particularly Section 151.060-3, in that said assessment was determined by taking that percentage of the total value of all the rolling stock of the Petitioner that the number of miles of the trackage of Petitioner in this State bears to the total length of the road as owned or controlled by Petitioner wherever situated.

Section 151.060-3 R. S. Mo., which prescribes the formula by which the Commission determined the assessed valuation on Petitioner's rolling stock in the State of Missouri, provides a fair and reasonable method to determine that amount of rolling stock of any railroad which extends beyond the limits of the State which may be taxed by this State and does not constitute a violation of any of the rights or privileges guaranted by the Constitution of Missouri or the Constitution of the United States.

This Formula, as used in conjunction with the determination of value using depreciation and a forty-seven per-

cent equalization factor together with the deduction of the economic factor as set out in the Findings of Fact, were used uniformly by the Commission to arrive at assessments of the rolling stock of the various railroads in this state, and to apply this formula to some railroads and not to others would be arbitrary and discriminatory.

The evidence adduced by the Petitioner does not show that the evaluation placed upon the rolling stock of Petitioner was grossly excessive, nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of Petitioner, nor does the evidence adduced by the Petitioner show that in applying the formula herein indicated that the Commission acted in an unlawful, unfair, improper, arbitrary or capricious manner.

Decision

The Commission, after giving due consideration and study to the records, evidence and data submitted on behalf of the Commission and studying the transcript of the proceedings before it, finds that the valuation of the Petitioner's property for the year 1966 should be as follows: $35,207,695.

State Tax Commission of Missouri

Hunter Phillips
Hunter Phillips, *Chairman*

Carl E. Davis
Carl E. Davis, *Commissioner*

Attest:
J. R. Towson
J. R. Towson, *Adm. Secretary*

CERTIFICATE OF SERVICE

I hereby certify that I have on the 24th day of May, 1967, forwarded by registered mail, return receipt required, postage prepaid, a copy of the above and foregoing to Forrest P. Carson, Attorney for Chicago, Burlington, & Quincy Railroad Company, 211 East Capitol Avenue, Jefferson City, Missouri.

ARNOLD BRANNOCK
Arnold Brannock, *Attorney*
State Tax Commission
of Missouri

SUPREME COURT, U. S.

FEB 6 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 931

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

v.

STATE TAX COMMISSION OF MISSOURI, HUNTER PHILLIPS, Chairman, CARL E. DAVIS and J. RALPH HUTCHISON, Members, J. R. TOWSON, Secretary,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

JOHN C. DANFORTH
Attorney General
LOUIS C. DEFEO, JR.
Assistant Attorney General
WALTER W. NOWOTNY, JR.
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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QUESTIONS PRESENTED

1. Whether a state deprives an interstate company of property without due process of law when the state's tax assessing agency, in determining the value of the company's property within the state for ad valorem property tax purposes, rejects the method of valuation presented

by the company and instead employs a method used by the tax assessing agency for assessing all like property.

2. Whether in assessing property for ad valorem property tax purposes, reliance by a state agency upon knowledge or information that was not part of the record in the proceedings before the agency denies a company whose property is being assessed the full and fair hearing guaranteed to it by the due process clause of the Fourteenth Amendment.

STATEMENT

The Missouri State Tax Commission assessed petitioner's distributable property that is located in Missouri for purposes of ad valorem taxation at the rate of $33,429,-871.00 under Chapter 151, RSMo 1959, as amended.

A hearing was held before the Commission at which the petitioner introduced three witnesses and the Commission introduced two.

The three witnesses for petitioner were Brady E. Travis, Consulting Valuation Engineer, J. Ed ard Connell, former employee of the Missouri State Tax Commission, and James P. Reedy, General Tax Agent of CB&Q. Basically, the evidence of petitioner was to establish a valuation of petitioner's railroad under a method designated by appellant as the "unit method."

Mr. Travis was introduced as an expert witness and described what petitioner means by the "unit method" of assessment and attempted to apply that method to Missouri. Mr. Travis was cross-examined about the various procedures used in the "unit method" and the particular applicability of this method in this particular valuation.

Mr. Connell was introduced as an expert on the general levels of taxation in Missouri and attempted to show

that property in Missouri is equalized at 25% to 30% of value. Mr. Reedy testified generally to the applicability of the "unit method" of valuation as a sole method of valuation and also as compared to the method used by the Commission. Mr. Reedy also attempted to show that the method used by the Commission results in an excessive and discriminatory assessment.

The Commission produced two witnesses, L. Glenn Key, General Land Agent of CB&Q and Carl A. Norfleet. Supervisor of Taxes, Missouri State Tax Commission.

Mr. Key's testimony was concerned with the value of right of way based on acquisitions and sales of land.

Mr. Norfleet described the method of assessment of the Commission and how the valuation in question was derived. Mr. Norfleet compared the Commission's method to petitioner's "unit method" and also discussed the value of the "unit method."

Simply stated the two methods of valuation are as follows:

A. Petitioner's Unit Method.

This method contemplates an approach to valuing an entire railroad system, enterprise or franchise by averaging two or three separate approaches to value.

1. The first is the net income or capitalized income approach in which the railroad's entire net operating income is averaged for the last five years as reported to the I.C.C. and is then capitalized at 7%. A portion of this figure is allocated to Missouri based on the mileage formula set out in Section 151.060(3), RSMo 1959.

3. The third is the cost or depreciated investment approach which is basically cost less depreciation and sometimes obsolescence. A portion of this figure is then

allocated to Missouri based on the mileage formula set out in Section 151.060(3), RSMo 1959.

The three factors are then averaged and equalized at 30%.

B. The Commission's Method.

The value of the railroad property is determined by appraising the property in the following four steps and then totalling the four values and applying an economic obsolescence factor.

1. A value per mile is placed on each type of track in Missouri.

2. A value per acre is placed upon the number of acres of right-of-way in Missouri.

3. A value is placed upon the buildings and other fixed property on the right-of-way in Missouri.

4. A value is placed on all rolling stock of the railroad based on cost less depreciation with a factor applied to reduce the value. A portion of this value is then allocated to Missouri based on the mileage formula set out in Section 151.060(3), RSMo 1959.

ARGUMENT

I.

What is really involved in this case is which of two methods or approaches to the valuation of petitioner's distributable property should be used by the Missouri State Tax Commission. This is a matter of state law and does not involve the principle relied upon by petitioner as stated in **Norfolk & Western Ry. v. Missouri State Tax Comm'n,** 390 U.S. 317 (1968).

Petitioner states the question as to whether there is a denial of due process when the Commission refused "to consider the evidence" presented by petitioner and instead relies upon "arbitrary and irrational formulas." The question presented by petitioner is thus based upon a false premise that the Commission refused "to consider the evidence" and is refuted by the record and the decision of the court below. We can not state it any better than the Missouri Supreme Court when they said:

> "The Commission's findings demonstrate a detailed recital and examination of the testimony of the railroad's witnesses and exhibits, and upon such examination that evidence was found to lack the credibility attached to the Commission's own presentation in arriving at the assessment. Appellant's charges of refusal to consider its case and protestations of unfair treatment are refuted by this record of nearly 900 pages and the Commission's findings of fact of nearly 62 pages which provide graphic attestation to ample opportunity for C.B.&Q. to present its theory to the Commission and full consideration of that theory by the Commission. The hearing procedure was thus in accord with the provisions of Section 151.060, supra, and appellant's citation. * * *" (A. 8-9)

What the Commission did was to reject the method proposed by the petitioner and instead utilized the method used for the valuation of the property of all railroads in Missouri, which method is authorized by statutory law, Chapter 151, RSMo. The court below approved of the method used by the Commission as being that authorized by Chapter 151, supra, and also approved of the rejection of petitioner's method by the Commission. (A. 9-10) The court below in approving the Commission's method as authorized by law did so with recognition of the real position of petitioner, that its theory of assessment should have

been used to the exclusion of the Commission's theory. (A. 11)

The tax laws involved here are for purposes of ad valorem taxation. Section 151.010, RSMo 1959, provides that the real property, tangible personal property, and intangible personal property of all railroads in Missouri shall be subject to taxation. The statute was enacted pursuant to Sections 4(a) and 5, Article X, Constitution of Missouri.

Section 3, Article X, Constitution of Missouri, provides that taxes may be levied for public purposes only, and shall be uniform on the same class of subjects, and that the methods of determining value of property shall be fixed by law. Section 4(a), Article X, Constitution of Missouri, provides for three classes of property for tax purposes, real, tangible personal and intangible personal property, and permits the legislature to provide for subclasses of tangible and intangible personal property. Section 4(b), Article X, Constitution of Missouri, provides that property in Class 1, real property, and Class 2, tangible personal property, and subclasses of Class 2, shall be assessed at value or such percentage of value as may be fixed by law for each class and subclass.

Pursuant to these constitutional directives Section 151.020, RSMo Supp. 1967, provides that each railroad company in Missouri shall furnish a statement to the Commission setting out in detail the total length of road, the length in Missouri, depots, water tanks and turntables, the length of road in various political subdivisions; and the total number of engines and cars and the actual cash value thereof. A copy of the statement required by Section 151.020, supra, is to be furnished to the various county courts, Section 151.030, RSMo 1959, so that such county

courts can examine the statement and determine the correctness as to the description and the valuation of the property reported, Section 151.040, RSMo 1959.

The Commission is then to assess, adjust and equalize the aggregate value of the property of the railroads, Subsection 1, Section 151.060, RSMo 1959, and is authorized to hold a hearing to do so, Subsection 2 of Section 151.060. Subsection 3 of Section 151.060 directs that a mileage formula be applied exclusively to rolling stock when an interstate railroad is being valued. See **Norfolk & Western Ry. v. Missouri State Tax Comm'n,** supra. The Commission then apportions the aggregate value to the various political subdivisions for assessment purposes according to a mileage formula, Section 151.080, RSMo Supp. 1967. Finally, the decision of the Commission shall be sent to the railroads and political subdivisions setting forth the entire length of the railroad in Missouri and the value per mile; the total value of the rolling stock; and the total length and value of the roadbed. Section 151.090, RSMo Supp. 1967.

Thus, the method of valuation used by the Commission is authorized and directed by Missouri law, as recognized and approved by the court below, as contrasted by the petitioner's method which was rejected as unsound and not applicable.

This case, then, is completely different from those cited by petitioner and there is no conflict of decisions. As stated above, petitioner primarily relies on the rule stated in **Norfolk & Western** (quoted on page 13 of its brief) as follows:

> "Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State." 390 U.S. at 325.

The reason such rule is not applicable here is that the rule applies to allocation formulas. The question in **Norfolk & Western** was whether a mechanical application of Missouri's mileage formula (Section 151.060.3, supra) to the railroad's rolling stock resulted in an allocation to Missouri of property that had no tax situs in Missouri. The railroad showed by uncontroverted evidence that some of its rolling stock had no relationship to Missouri. Hence the inclusion of such rolling stock in the application of the mileage formula resulted in a denial of due process and a violation of the commerce clause.

The petitioner has never in this case, and does not now, contended that Missouri is taxing property not having a tax situs in Missouri. Petitioner has made no complaint about the Commission's application of the mileage formula to the rolling stock, nor does petitioner contend any of the other property valued is not located in Missouri. Therefore, the primary reason that petitioner is asking this Court to grant this writ has no basis in law or fact.

The rules that are applicable from **Norfolk & Western** are stated at 390 U.S. 323 and 324. It is settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise. That fair share may be regarded as the value, appropriately ascertained, employed in the taxing State, including a portion of the intangible, or "going concern" value of the enterprise.

The record clearly shows that the Commission only attempted to value property permanently or habitually employed in Missouri. The Commission ascertained the value according to Missouri law. Petitioner's claim of taking property without due process of law is thus merely a complaint that its method of valuation was rejected by the Commission and the court below. There was no show-

ing by the petitioner that its property in Missouri was valued and assessed differently in relation to other railroad's property or all other property in Missouri. There was no showing that the Commission failed to properly use the method authorized and approved in Missouri, and also no showing, using the method authorized and approved in Missouri, that the assessed valuation made by the Commission was improper.

The question of the value of property for taxation, turns upon its own facts and the methods to be employed are solely a matter of State law. Accordingly, and in view of the fact that the decision of the court below does not conflict with **Norfolk & Western,** this petition for writ of certiorari should be denied.

II.

Respondents do not contest that the petitioner is entitled to a fair hearing. This right was also recognized by the court below. (A. 8) Petitioner had a full hearing and presented its theory of assessment. The Commission's method was also fully explained in the hearing and in the findings of fact and conclusions of law.

Petitioner had its chance to refute the Commission's method of valuation and failed. What the petitioner failed to do was show how the method provided by law and used by the Commission was incorrect and unlawful.

CONCLUSION

The decision below is not in conflict with **Norfolk & Western Ry. v. Missouri State Tax Comm'n,** 390 U.S. 317 (1968), as claimed by the petitioner, because there has been no attempt by the Commission to value property not located in Missouri, and petitioner has not made any such claim. Petitioner had a full hearing before the Commis-

sion and failed to show that its method was a proper method for valuation, and the Commission and the court below could and properly did reject petitioner's method, and the Commission and the court below could and did properly apply the method provided for by Missouri law. The question of valuation turns upon its own facts and is a matter of state law. The petition should be denied.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General of Missouri
LOUIS C. DEFEO, JR.
Assistant Attorney General
WALTER W. NOWOTNY, JR.
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
Attorneys for Respondents

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No. 931

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Petitioner,

v.

STATE TAX COMMISSION OF MISSOURI, HUNTER PHILLIPS, Chairman, CARL E. DAVIS and J. RALPH HUTCHISON, Members, J. R. TOWSON, Secretary, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF FOR PETITIONER

WILLIAM H. ALLEN
701 Union Trust Building
Washington, D.C. 20005

JOHN C. STREET
615 C. A. Johnson Building
Denver, Colorado 80202

CLYDE J. LINDE
Floor Three
Union National Bank Bldg.
Kansas City, Missouri 64106

Attorneys for Petitioner

Of Counsel:

RICHARD T. CUBBAGE
COVINGTON & BURLING
LINDE, THOMSON, VANDYKE, FAIRCHILD & LANGWORTHY

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF FOR PETITIONER

Respondents in their Brief in Opposition to Burlington's Petition make three basic points: (1) that "the method of valuation used by the Commission is authorized and directed by Missouri law" (Br. in Opp. 7); (2) that the "real position of petitioner [is] that

its theory of assessment should have been used to the exclusion of the Commission's theory" (Br. in Opp. 5-6); and (3) that the rule of *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n,* 390 U.S. 317 (1968), "is not applicable here [in] that the rule applies to allocation formulas" (Br. in Opp. 8). The respondents' first point is obvious and is not disputed by the Burlington; their two other points are incorrect.

I

Without question the Missouri Supreme Court sustained, as a matter of State law, the Tax Commission's method of assessing the railroad's property. The Burlington has not argued and could not argue before this Court that the Commission or the Court below erred in its interpretation of State law. The Burlington's position here is rather that, in approving as a matter of State law the method of assessment used by the Commission, the Missouri Supreme Court has disregarded the limitations upon the State's taxing authority that are set forth in the due process clause of the Fourteenth Amendment, as recently articulated in *Norfolk & Western Ry.* v. *Missouri State Tax Comm'n, supra.*

II

The respondents misstate the issue when they say that "what is really involved in this case is which of two methods or approaches to the valuation of petitioner's distributable property should be used by the Missouri State Tax Commission" (Br. in Opp. 4) and that "the real position of petitioner [is] that its theory of assessment should have been used to the exclusion of the Commission's theory" (Br. in Opp. 5-6). At no

point before the Missouri State Tax Commission, the Missouri Courts or this Court (see Petn. 9) has the Burlington taken the position that Missouri is constitutionally bound to use the Burlington three-factor formula in assessing the railroad's property. Instead, it has been the position of the Burlington throughout these proceedings that its suggested method of valuation is both an accurate way to assess railroads and a reliable and convenient check upon the method used by Missouri. The statement of the Burlington's counsel before the Missouri State Tax Commission makes the Burlington's position on this matter crystal clear:

> "The point we would like to make is that we would like to have the Commission use the unit method because we think it is accurate and we think you would arrive at a better and more realistic and reasonable assessment. On the other hand, we do not contend that you are required to use it.
>
> "The next point is that even if you don't use it, whatever system you do use, we think that the unit method approach furnishes a very reliable check as to whether the valuation reached by the Commission, by the method it follows, lies within the reasonable boundaries of an acceptable and realistic assessment.
>
> "So we think we can prove that your figure is too high, it ought to be considerably lower." (R. 44-45).

There are any number of ways in which the Missouri Commission could have modified its own approach to the valuation of the Burlington to take into account the real value of the Burlington's property as reflected in its evidence. For example, in calculating the "eco-

nomic obsolescence factor," the Commission could have made a rational comparison between the Burlington's actual return on the book value of its operating property and some postulated desirable return, instead of merely reducing the assessment by a factor derived by subtracting the former figure from the latter. (See Petn. 6-7, 16-17). Or the Commission could have reexamined the arbitrary $20,000 a mile assessment set on main-line track and the equally arbitrary figure of $60 an acre used for assessing right-of-way.

In short, the Burlington did not at any point suggest that the Commission must follow the Burlington's method of assessment but instead argued only that the Commission was bound to modify its method to take into account the Burlington's evidence of real value.

III

In arguing that the rule of the *Norfolk & Western* case is not applicable here because in that case the State's mileage formula "resulted in an allocation to Missouri of property that had no tax situs in Missouri" whereas in the present case the petitioner "has never in this case, and does not now, contend that Missouri is taxing property not having a tax situs in Missouri" (Br. in Opp. 8), respondents ignore the substance of the claim at issue in both *Norfolk & Western* and this case.

The respondents admit that "it is settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise" and that this "fair share may be regarded as the value, appropriately ascertained, employed in the taxing State, including a portion of the intangible or 'going con-

cern' value of the enterprise." (Br. in Opp. 8). Both the *Norfolk & Western* case and this case are concerned with determining whether Missouri has in fact taxed more than its "fair share" of railroad property. If it has taxed more than that fair share, Missouri's tax inevitably falls upon property located outside the State in violation of the due process clause.

In *Norfolk & Western* the mechanical application of the Missouri mileage formula resulted in taxation of more units of rolling stock than were actually in the State. In the instant case, the application of several mechanical and arbitrary formulas to the Burlington has resulted in Missouri's taxing a greater portion of the Burlington's system than in fact lies within Missouri. In both cases, therefore, the State has taxed values actually lying outside Missouri and has exceeded the limitations imposed upon it by the due process clause. Accordingly, the principle of the *Norfolk & Western* case—that "any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State," 390 U.S. at 325—is fully applicable here.

* * * *

Finally, we simply note that with respect to the second question presented—whether the Burlington was deprived of a fair hearing because the Commission acted upon evidence outside the record—the respondents state only that the Burlington had the opportunity to present its theory of assessment and that the Commission's method was fully explained. The respondents do not suggest, and indeed they are precluded from doing so by the record, that there was any evidence of value introduced before the Commission to sustain its arbitrary and irrational assessment.

CONCLUSION

For the reasons stated herein and in the petition for certiorari, the petition should be granted.

Respectfully submitted,

WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

JOHN C. STREET
615 C. A. Johnson Building
Denver, Colorado 80202

CLYDE J. LINDE
Floor Three
Union National Bank Bldg.
Kansas City, Missouri 64106

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